(6)

No. 05-1541

Title: EC Term of Years Trust, Petitioner
v.
United States

Docketed: June 2, 2006
Lower Ct: United States Court of Appeals for the Fifth Circuit
Case Nos.: (05-50068)
Decision Date: January 3, 2006
Rehearing Denied: March 2, 2006
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
May 15 2006	Order further extending time to file response to petition to and including August 23, 2006.
May 31 2006	Petition for a writ of certiorari filed. (Response due July 3, 2006)
Jun 29 2006	Order extending time to file response to petition to and including August 2, 2006.
Jul 31 2006	Order further extending time to file response to petition to and including August 16, 2006.
Aug 15 2006	Order further extending time to file response to petition to and including August 23, 2006.
Aug 23 2006	Brief of respondent United States filed.
Oct 4 2006	DISTRIBUTED for Conference of October 27, 2006.
Oct 27 2006	Petition GRANTED.
Nov 15 2006	Record received from U.S.C.A. for 5th Circuit. (1 envelope)
Nov 15 2006	Record received from U.S.D.C. for Western District of Texas. (1 envelope)
Dec 11 2006	Joint appendix filed.
Dec 11 2006	Brief of petitioner EC Term of Years Trust filed.
Dec 18 2006	SET FOR ARGUMENT ON Monday, February 26, 2007.
Jan 16 2007	Brief of respondent United States filed.
Jan 18 2007	CIRCULATED.
Feb 16 2007	Reply of petitioner EC Term of Years Trust filed. (Distributed)
Feb 26 2007	Argued. For petitioner: Francis S. Ainsa, Jr., El Paso, Tex. For respondent: Deanne E. Maynard, Assistant to the the Solicitor General, Department of Justice, Washington, D.C.

Supreme Court, U.S.
FILED
05154 JUL 31 2006
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No. 05-

IN THE

Supreme Court of the United States

EC TERM OF YEARS TRUST,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In September 1999, the Internal Revenue Service levied on a bank account owned by Petitioner containing $3,389,426.37. The purpose of the levy was to pay federal income taxes, penalties and interest assessed against Elmer W. Cullers, Jr. and Dorothy Cullers. On September 7, 2000, Petitioner filed a complaint against Respondent under 26 U.S.C. §7426 for a wrongful levy. On December 28, 2000, the district court dismissed the complaint for wrongful levy for lack of subject matter jurisdiction because it had been filed more than nine months after the levy and was time barred under 26 U.S.C. §7426. Petitioner then filed a claim under 28 U.S.C. §1346 to recover the funds seized through the levy. When the claim proved unsuccessful, Petitioner filed suit against Respondent to recover the sum of $3,389,426.37 under 28 U.S.C. §1346. On November 22, 2004, the district court dismissed Petitioner's Complaint on the ground that a claim under 26 U.S.C. §7426 is the sole and exclusive remedy for a wrongful levy. Since Petitioner's complaint for a wrongful levy under 26 U.S.C. §7426 had been dismissed earlier due to being time barred, its complaint for a refund under 28 U.S.C. §1346(a) was also dismissed. The Fifth Circuit affirmed the dismissal of Petitioner's complaint under 28 U.S.C. §1346 and held that 26 U.S.C. §7426 is the sole and exclusive remedy for a wrongful levy.

The following question is presented:

May a person who is not the assessed taxpayer utilize 28 U.S.C. §1346 to seek a refund when its funds were seized through a wrongful levy and it had an opportunity to utilize the wrongful levy procedure under 26 U.S.C. §7426?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *E.C. Term of Years Trust v. United States of America*, 434 F.3d 807 (2006) (App. A). The Fifth Circuit affirmed the November 22, 2004 decision of the United States District Court for the Western District of Texas - El Paso Division, reported at 2004 WL 911307 (not reported in the Federal Supplement) (App. B).

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The District Court's order was entered on November 22, 2004. The Fifth Circuit's opinion was rendered on January 3, 2006. A petition for a panel rehearing was denied on March 2, 2006 (App. C).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 26 United States Code, Section 7426:

(a) Action permitted

(1) Wrongful levy. If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such sevy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may brig a civil action against the

> United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary.

Title 28 United States Code, Section 1346:

> (a) The district courts shall have original jurisdiction, concurrent with the United States Claims Courts [United States Court of Federal Claims], of:
>
> (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws[.]

STATEMENT OF THE CASE

In 1993, the Internal Revenue Service assessed additional federal income taxes, penalties and interest against Elmer W. Cullers, Jr. and Dorothy Cullers for tax years 1981 through 1984. In 1999, the Internal Revenue Service filed transferee tax liens against Petitioner for the tax liability owed by Elmer W. Cullers, Jr. and Dorothy Cullers.

In 1999, Petitioner, under an agreement with the Internal Revenue Service, deposited the total amount of taxes, penalties and interest due by Elmer W. Cullers, Jr. and Dorothy Cullers in a bank account and notified the Internal

Revenue Service so that it could levy on the account. In September 1999, the IRS levied on the bank account established by Petitioner, which contained $3,389,426.37, and seized all funds therein to satisfy the tax liabilities owed by Elmer W. Cullers, Jr. and Dorothy Cullers.

In September, 2000, Petitioner filed a complaint for a wrongful levy under 26 U.S.C. §7426; however, the complaint was filed more than nine months after the levy. On December 28, 2000, the District Court dismissed the complaint for wrongful levy for lack of subject matter jurisdiction because it was time barred.

Petitioner then sought a refund under 28 U.S.C. §1346 and on September 5, 2003, filed a complaint for a refund of the $3,389,426.37. On November 22, 2004, the District Court held that Petitioner's sole remedy was under 26 U.S.C. §7426 and dismissed Petitioner's Complaint for a Refund under 28 U.S.C. §1346.

Petitioner appealed the case to the Fifth Circuit in reliance on this Court's holding in *United States v. Williams*, 514 U.S. 527, 530 (1995) and the Court of Appeals for the Ninth Circuit's holding in *WWSM Investors v. United States*, 64 F.3d 456 (9th. Cir. 1995). In its opinion, the Fifth Circuit distinguished the holding in *United States v. Williams* from the facts of this case and rejected the holding in *WWSM Investors v. United States* even though it sanctioned the use of 28 U.S.C. §1346 when the taxpayer also had the opportunity to use 26 U.S.C. §7426. The Fifth Circuit held that the wrongful levy procedure under 26 U.S.C. §7426 is the exclusive remedy for a wrongful levy and affirmed the dismissal of Petitioner's Complaint for a Refund under 28 U.S.C. §1346.

I. REVIEW IS WARRANTED TO RESOLVE THE CONFLICT BETWEEN THE FIFTH CIRCUIT AND THE NINTH CIRCUIT REGARDING WHETHER 26 U.S.C. §7426 IS THE EXCLUSIVE REMEDY FOR A WRONGFUL LEVY AND TO CONFIRM THE SCOPE OF 28 U.S.C. §1346 AS INTERPRETED IN *WWSM INVESTORS v. UNITED STATES*, 64 F.3d 456 (9th Cir 1995) TO PREVENT CONFLICTS BETWEEN CIRCUIT COURTS OF APPEAL.

A. A conflict exists between the Fifth Circuit and the Ninth Circuit regarding whether 26 U.S.C. §7426 is the exclusive remedy for a wrongful levy.

This case involves the issue of whether a third party (Petitioner) who pays the taxes assessed against other taxpayers (Elmer W. Cullers, Jr. and Dorothy Cullers) under a wrongful levy can avail itself of the refund provisions of 28 U.S.C. §1346 when it had an opportunity to avail itself of the wrongful levy procedure under 26 U.S.C. §7426.

The Ninth Circuit Court of Appeals has held that 26 U.S.C. § 7246 is not the exclusive remedy for a wrongful levy under facts very similar to this case. *WWSM Investors v. United States*, 64 F.3d 456 (9th Cir 1995). *WWSM Investors* involved a levy of a bank account as opposed to a payment to the Internal Revenue Service to remove a tax lien as was the case in *United States v. Williams*. WWSM Investors filed its complaint under 26 U.S.C. §7426 more than nine months following the levy. The district court denied WWSM leave to amend its complaint to set forth a claim for a refund under 28 U.S.C. §1346. The district court then dismissed the case on the grounds that 26 U.S.C. §7426 was the exclusive remedy and that the court lacked subject matter jurisdiction because the claim was time barred.

The Ninth Circuit reversed the case and held that WWSM Investors had a separate cause of action for a refund under 28 U.S.C. §1346. In concluding that 28 U.S.C. §1346 is available to a taxpayer who had an opportunity to utilize 26 U.S.C. §7426, the Ninth Circuit relied upon this Court's holding in *United States v. Williams*, 514 U.S. 527, 530 (1995). The Ninth Circuit refused to recognize any distinction between the fact that a lien was involved in *United States v. Williams* while a levy was involved in *WWSM Investors*. The Court was also not persuaded to limit the holding in *United States v. Williams* to fact situations where the taxpayer bringing a refund action under 28 U.S.C. §1346 could not have filed a wrongful levy action under 26 U.S.C. §7426. In essence, the Ninth Circuit in *WWSM Investors* found that 26 U.S.C. §7426 was not the exclusive remedy available to a third party who paid the taxes of another assessed taxpayer and who had an opportunity to use 26 U.S.C. §7426. The Ninth Circuit's holding in *United States v. Williams* stands for the proposition that the language in 28 U.S.C. §1346 encompasses third party refund claims even when the taxpayer had the opportunity to use 26 U.S.C. §7426.

The Ninth Circuit Court of Appeals also spoke on the exclusivity issue in *Fidelity and Deposit Company of Maryland v. City of Adelanto*, 87 F.3d 334 (9th Cir. 1996). This case involved a notice of levy served on the City for money owed to a third party. Fidelity and Deposit contested the levy but not through the use of 26 U.S.C. §7426. The district court dismissed the case partially on the grounds that the 26 U.S.C. §7426 was the exclusive remedy and that, based on the facts, such an action was time barred. In its opinion, the Ninth Circuit stated: "Thus, to the extent that a refund action is available, Section §7426 is not the exclusive remedy for a wrongful levy and to this extent, *Winebrenner* has been overruled by *Williams*." *Fidelity and Deposit Company of Maryland* at 338.

B. The scope of 28 U.S.C. §1346 as interpreted in *WWSM Investors v. United States*, 64 F.3d 456 (9th Cir. 1995) should be confirmed to prevent conflicts between Circuit Courts of Appeal.

26 U.S.C. §7426 of the Internal Revenue Code constitutes a grant of jurisdiction and a waiver of sovereign immunity. It enables a third party to sue the government for relief in federal district court, whether or not property has actually been seized. 26 U.S.C. §7426 (b). It is a pre-deprivation remedy. 26 U.S.C. §7426 was added to the Internal Revenue Code by the Federal Tax Lien Act of 1966.

In the pre-26 U.S.C. §7426 era, Federal courts permitted third parties to restrain wrongful levies; *Raffaele v. Granger*, 196 F.2d 620 (3d Cir. 1952); *Tomlinson v. Smith*, 128 F.2d 808 (7th Cir. 1942); *Rothensies v. Ulmman*, 110 F.2d 590 (3d Cir. 1940); and to obtain declaratory judgments on rights to property; *Bullock v. Latham*, 306 F.2d 45 (2d Cir. 1962). Federal courts also permitted third parties to recover money wrongfully taken even if deposited with the Treasury Department. *Stuart v. Chinese Chamber of Commerce of Phoenix*, 168 F.2d 709 (9th Cir. 1948); *Karno-Smith Co. v. Maloney*, 112 F.2d 690 (3d Cir. 1940); *Szerlip v. Marcelle*, 136 F. Supp. 862 (DC N.Y. 1955); *Colorado Milling & Elevator Co. v. Glenn*, 118 F. Supp. 943 (DC. Ky. 1954). During this period, the government often contended that third parties seeking a return of funds from the IRS were subject to the refund procedure in the Internal Revenue Code. *United States v. Worley*, 213 F.2d 509 (6th Cir. 1954).

Prior to the decision in *United States v. Williams*, the dominant judicial view was that 26 U.S.C. §7426 was the exclusive remedy available to a third party to contest a

wrongful levy. The lead case was *United Sand and Gravel Contractors, Inc. v. United States*, 624 F.2d 733 (5th Cir. 1980). In that case, a subcontractor claimed an interest in funds due to the prime contractor that had been seized by the IRS to satisfy the prime contractor's liability. The subcontractor filed suit under the Quiet Title Act (28 U.S.C. §2410), which provided for a six-year statute of limitations. The government's motion to dismiss was granted based on lack of subject matter jurisdiction. The Fifth Circuit held that the subcontractor's exclusive remedy was to file a wrongful levy action under 26 U.S.C. §7426, which was no longer possible because more than nine months had elapsed since the levy.

Prior to *United States v. Williams*, the only case with a holding in opposition to the holding in *United Sand and Gravel Contractors, Inc.* was *Gordon v. United States*, 649 F.2d 837, 47 AFTR 2d 81-1503 (Ct. Cl. 1981). The Court of Claims opined that Section 7426 was intended solely to expand the availability of third party relief in federal district courts and rejected the contention that it was the exclusive means of seeking relief in third party levy cases.

In *United States v. Williams*, the issue was whether a third party (Ms. Williams) who paid the tax assessed against another person (her former husband) to remove a tax lien could pursue a tax refund under 28 U.S.C. §1346. The United States made three critical arguments:

1. Ms. Williams was not a taxpayer and, therefore, could not pursue a refund;

2. Allowing third party refund suits would render 26 U.S.C. §7426 superfluous because, prior to

26 U.S.C. §7426, third parties were unable to sue the government directly;

3. Allowing third party refund suits would frustrate collection efforts against the primary obligor.

This Court rejected these arguments and held that 28 U.S.C. §1346 did not limit refund jurisdiction to assessed taxpayers but included third persons who actually paid the taxes. This Court also noted that 28 U.S.C. §1346 codified the common law *assumsit* action that third parties had historically brought against the tax collector to recover money erroneously collected. This Court also found that, since no levy had been served on Ms. Williams, Section 7426 was not available to her in any event. However, of primary importance to this case, this Court also held that the use of 28 U.S.C. §1346 by Ms. Williams would not render superfluous other actions such as wrongful levy. *United States v. Williams* at 538. The Court noted that 28 U.S.C. §1346 is a post-deprivation remedy and is available only when the third party has paid the government in full. Conversely, a wrongful levy action is a pre-deprivation remedy and is available even if the property in question has not been surrendered. *United States v. Williams* at 539. The holding in *United States v. Williams* clearly stands for the proposition that 26 U.S.C. §7426 is not the exclusive remedy available to a third party who pays the tax liability of another assessed taxpayer.

In *United States v. Williams*, this Court held that a third party was a taxpayer for the purposes of seeking a refund under Section 1346 and rejected the government's argument that, at the time 26 U.S.C. §7426 was enacted, no other remedies were available to nontaxpayers. While this Court

noted the fact that Ms. Williams could not have brought a wrongful levy action, that fact was not the basis for the holding. This Court never stated that its holding was based on the non-availability of a wrongful levy remedy. Interestingly, neither the courts nor the Internal Revenue Service appear to have ever taken the position that an assessed taxpayer is precluded from pursuing a refund simply because the overpayment arose through a levy. Arguing that a different set of rules applies to third parties who pay, is tantamount to arguing that the distinction between assessed taxpayers and third party taxpayers struck down by *United States v. Williams* is still alive and well.

The District Court, in its Order[1], conceded that this Court's holding in *United States v. Williams* rejected the law of the Fifth Circuit (District Court's Order, p. 4 - see Appendix) and stated the holding in *United States v. Williams* would have required a different result in *Snodgrass v. United States*, 834 F.2d 537 (5th Cir. 1987) on the issue of standing. However, the district court chose to dismiss Petitioner's complaint for a refund by concluding that the holding in *United States v. Williams* ". . . establishes an equitable exception for those who cannot otherwise avail themselves of pre -deprivation remedies." (District Court's Order, p. 7). The equitable exception found by the District Court is based on the rationale set forth in the dissent in *United States v. Williams*. However, in *United States v. Williams* this Court was faced with similar arguments and rejected them in fashioning its holding. The government first tried to convince the Court that a third person who paid the taxes of the assessed person was not a taxpayer. That argument was

1. The Order issued by the United States District Court of the Western District of Texas, El Paso Division, dated November 22, 2004, is attached hereto in its entirety in the appendix.

rejected outright. *United States v. Williams* at 535. The government also argued that if Section 1346 could be used by someone like Williams, the levy, quiet title, and separate fund remedies would become superfluous. The Court noted that Section 1346 is a post-deprivation remedy that is available only if the government has been paid in full. *United States v. Williams* at 538. The other remedies, including wrongful levy, are pre-deprivation remedies and do not depend on surrender of the property in question. *United States v. Williams* at 538. The government also argued that allowing Williams to sue would lead to widespread abuse. This Court rejected that argument also. *United States v. Williams* at 540.

A fair reading of *United States v. Williams* does not result in the conclusion that its holding is limited to its facts. This Court put to rest this issue of whether a third person who pays the tax of another person is a taxpayer. This created standing for third persons who paid the taxes of an assessed person. The Supreme Court also plainly acknowledged the "evident breadth of §1346 (a) (1) . . ." in dealing with the governments arguments. *United States v. Williams* at 532. This Court determined that 28 U.S.C. §1346 is another way for a third person who pays the full tax of an assessed person to seek the return of the funds paid. In its holding, this Court implicitly determined that 26 U.S.C. §7426 does not provide the exclusive remedy to a taxpayer. While 26 U.S.C. §7426 may be utilized to recover taxes seized by a wrongful levy, 28 U.S.C. §1346 may also be utilized by a third party who has paid the full amount of the taxes due. There is no language in 26 U.S.C. §7426 that can reasonably be seized upon to conclude that it precludes a taxpayer from using 28 U.S.C. §1346 if he or she has followed the procedures for a refund. The use of the "equitable exception" construct flies in the face of the holding in *United States v. Williams* and continues

the now rejected notion that exclusivity was intended when there is a complete absence of such language in 26 U.S.C. §7426.

In the final analysis, this Court should recognize that 26 U.S.C. §7426 is a pre-deprivation remedy and 28 U.S.C. §1346 is a post-deprivation remedy. These statutes were enacted to serve different purposes. There is no coherent rationale for concluding that 26 U.S.C §7426 and 28 U.S.C. §1346 cannot be available as alternative remedies. It should not matter that 26 U.S.C. §7426 could have been used as long as the taxpayer can avail itself of 28 U.S.C. §1346.

CONCLUSION

For the reasons stated above, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED JANUARY 3, 2006

UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

No. 05-50068

EC TERM OF YEARS TRUST,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Before REAVLEY, GARZA and BENAVIDES, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

EC Term of Years Trust ("the Trust") appeals from the district court's dismissal of its refund claim under 28 U.S.C. § 1346. The district court held that because the Trust's sole and exclusive remedy lay in a wrongful levy action under 26 U.S.C. § 7426, the Trust's refund claim must be dismissed for lack of subject matter jurisdiction. Appellant now argues that the district court erred when it determined that § 7426 was the exclusive remedy available to the Trust.

Appendix A

After assessing federal income taxes, penalties, and interest against Elmer and Dorothy Cullers, the Trust's creators, the Internal Revenue Service ("IRS") filed transferee tax liens against the Trust for the Cullers's tax liability. Ultimately, the IRS seized the total amount owed from an account created by the Trust for the purpose of dispatching the Cullers' debt. The Trust then sought to recover the funds under 26 U.S.C. § 7426(a)(1)[1] and 28 U.S.C. § 1346(a)(1)[2]. Because the Trust brought suit after the statute of limitations had run on the wrongful levy action under § 7426, *see* 26 U.S.C. § 6532(c)(1) (providing a 9 month statute of

1. 26 U.S.C. § 7426(a)(1) provides:

> If a levy has been made on property or a property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which the levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary.

2. 28 U.S.C. § 1346(a)(1) provides:

> The district courts shall have original jurisdiction . . . of . . . [a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws.

limitations for suits brought under § 7426), the district court dismissed that claim for lack of subject matter jurisdiction.[3]

The Trust then brought suit a second time, again seeking a refund under § 1346(a)(1). After determining that the earlier decision had not been a decision on the merits for the purposes of *res judicata*, the district court directly addressed the question of whether a wrongful levy claim under § 7426 remained the "sole and exclusive" remedy for third parties such as the Trust in light of the Supreme Court's decision in *United States v. Williams*, 514 U.S. 527, 115 S.Ct. 1611, 131 L.Ed.2d 608 (1995), which allowed a third party who had removed a lien on her property by paying the tax liability of another individual to bring a refund action under § 1346(a)(1). In a well-reasoned opinion, the district court distinguished *Williams* and held that a wrongful levy action

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3. Because the statute of limitations had lapsed on the § 7426 claim, the government had not waived its sovereign immunity, thus precluding suit. *See Block v. North Dakota*, 461 U.S. 273, 287, 103 S.Ct. 1811, 75 L.Ed.2d 840 (1983) ("When waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity."); *Bank One Texas v. United States*, 157 F.3d 397, 403 (5th Cir.1998) (discussing a statute of limitations as a "condition" to the waiver of sovereign immunity). The district court also dismissed the claim under § 1346, noting that § 7426 was "the *exclusive* remedy for an innocent third party whose property is confiscated by the IRS to satisfy another person's tax liability." *Tex. Commerce Bank Fort Worth, N.A. v. United States*, 896 F.2d 152, 156 (5th Cir.1990) (citing *United Sand and Gravel Contractors v. United States*, 624 F.2d 733, 739 (5th Cir.1980)). Because the district court held that § 7426 was the only remedy available to the Trust, the government had not waived sovereign immunity under § 1346 either.

remained the exclusive remedy for the Trust and dismissed the Trust's complaint for lack of subject matter jurisdiction. The Trust now appeals. We review a dismissal for lack of subject matter jurisdiction *de novo*. *Bank One Texas*, 157 F.3d at 403.

This appeal presents the straightforward question of whether a wrongful levy action under § 7426 is the "exclusive remedy for an innocent third party whose property is confiscated by the IRS to satisfy another person's tax liability." *See Tex. Commerce Bank*, 896 F.2d at 156. This court historically has held that if § 7426 is available to an individual, then it is his sole and exclusive remedy. *See id.*; *United Sand and Gravel Contractors*, 624 F.2d at 739 ("When someone other than the taxpayer claims an interest in property or rights to property which the United States has levied upon, his exclusive remedy against the United States is a wrongful levy action under I.R.C. § 7426."); *see also Oxford Capital Corp. v. United States*, 211 F.3d 280, 289 (5th Cir.2000) (Dennis, J., concurring) ("[A] wrongful levy action under section 7426 is the exclusive remedy of a third person whose property has been seized without probable cause of a nexus between the property and the tax debtor."). § 7426 reflects the government's strong interest in resolving "doubts concerning the status of the taxpayer's account swiftly." *United Sand and Gravel Contractors*, 624 F.2d at 739. The short statute of limitations governing claims under § 7426 allows for the expeditious resolution of tax liability. *See Gordon v. United States*, 227 Ct.Cl. 328, 649 F.2d 837, 844 (1981) (reviewing the legislative history of the nine month statute of limitations under § 6532(c)).

Appendix A

Appellant now argues that the Supreme Court's decision in *Williams* has altered the landscape of recovery actions against the IRS and allows litigants to bring a refund action under § 1346, even if § 7426 was available to them. In *Williams*, the Supreme Court held that § 1346 authorized a refund suit by a third party who had paid a tax under protest to remove a federal tax lien from her property. 514 U.S. at 529, 115 S.Ct. 1611. The Court parsed the language of § 1346 and determined that the "provision does not say that only the person assessed may sue," and thus did not speak directly to the issue of whether a third party could bring suit under § 1346. *Id.* at 531, 115 S.Ct. 1611 (emphasis added). Ultimately, the Court determined that Williams had standing to sue under § 1346. *Id.* at 540, 115 S.Ct. 1611.

We disagree with appellants that *Williams* must be read to allow litigants who could bring suit under § 7426 *also* to bring suit under § 1346. The *Williams* decision does not suggest that a refund action under § 1346 is available *in addition* to a wrongful levy action under § 7426. The Supreme Court specifically noted that Williams could not have brought a claim under § 7426, and would have wholly lacked a remedy in the absence of a claim under § 1346. *Williams*, 514 U.S. at 536, 115 S.Ct. 1611. Indeed, the Court noted that by authorizing "*some* third-party suits . . . the levy . . . remed[y does not] become superfluous." *Id.* at 538, 115 S.Ct. 1611 (emphasis added). The *Williams* opinion can fairly be read to apply when a remedy under § 7426 is unavailable, a situation that does not exist in the instant case. To construe *Williams* to allow an alternative remedy under § 1346, with its longer statute of limitations period, *see* 26 U.S.C. §§ 6511(a), 6532(a)(1), would undermine the surety provided by the clear avenue to recovery under § 7426.

Appendix A

In the wake of *Williams*, several of our sister circuits have maintained that § 7426 is the exclusive remedy for third party wrongful levy claims. *See Dahn v. United States*, 127 F.3d 1249, 1253 (10th Cir.1997) (holding that *Williams* did not "overturn, sub silentio, the separate and well-established principle that § 7426 provides the exclusive remedy for a wrongful levy"); *see also Becton Dickinson & Co. v. Wolckenhauer*, 215 F.3d 340, 352 (3d Cir.2000) (discussing the exclusivity of the remedy available to third parties for wrongful levies under § 7426); *Miller v. Tony and Susan Alamo Found.*, 134 F.3d 910, 916 (8th Cir.1998) ("Section 7426(a)(1) is the exclusive remedy of third parties who seek to assert claims on IRS-levied property."); *Audio Investments v. Robertson*, 67 Fed.Appx. 795, 797 (4th Cir.2003) (per curiam) (unpublished) ("An action for wrongful levy under [§ 7426] is the exclusive means for challenging a levy on property that 'does not . . . belong to the taxpayer against whom the levy originated.' "). The only exception is the Ninth Circuit, which has permitted third parties whose bank accounts were levied to bring refund actions under § 1346. *See WWSM Investors v. United States*, 64 F.3d 456, 458-59 (9th Cir.1995). *But see Fidelity & Deposit Co. of Maryland v. City of Adelanto*, 87 F.3d 334, 335 (9th Cir.1996) (holding that "where suit is by a nontaxpayer third party and § 7426(a)(1) applies, and the alternative basis proffered for waiver of sovereign immunity is an action to quiet title under § 2410(a)(1) . . . § 7426 is the exclusive remedy.").

We conclude that the Supreme Court's decision in *Williams* does not alter our long-standing rule regarding the exclusivity of the remedy available under § 7426. *See United Sand and Gravel Contractors*, 624 F.2d at 739. Therefore,

we follow our prior holdings that when § 7426 is available to an individual, then it is his sole and exclusive remedy.

Accordingly, we AFFIRM the district court's decision to dismiss for lack of subject matter jurisdiction.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, EL PASO DIVISION DATED AND FILED NOVEMBER 22, 2004

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

Civil No. EP-03-CA-363(KC)

EC TERM OF YEARS TRUST,

Plaintiff,

-vs-

UNITED STATES OF AMERICA,

Defendant.

ORDER

In its Order denying defendant's motion to dismiss the present complaint on res judicata grounds (Doc. No. 13), this Court ordered that plaintiff show cause why the complaint on a tax refund should not be dismissed for failure to pursue a wrongful levy claim.

Familiarity with this Court's prior Order is presumed. This Court's jurisdictional concern, as properly identified by plaintiff, centers on the interaction of two cases, *United States v. Williams*, 514 US 527 (1995), and *Texas Commerce Bank-Fort Worth, NA v. United States*, 896 F.2d 152 (5th

Cir. 1990), and the reasoning articulated in *Dahn v. United States*, 127 F.3d 1249 (10th Cir. 1997). Plaintiff in its response, argues that *Williams* "created a rationale for abandoning a strict application of the exclusivity rule in all cases and giving effect to the plain language in § 13[4]6(a) where necessary to give effect to the ends of justice." Pl.'s Resp. at 2. Plaintiff further argues that as his wrongful levy case was dismissed for lack of subject matter jurisdiction, a preclusion on exclusivity of remedies is not implicated as the merits of the claim were not litigated. Plaintiff further identifies *WWSM Investors v. United States*, 64 F3d 456 (9th Cir. 1995) (declining to limit *Williams* to its facts) as requiring a contrary outcome than proposed in the present case.

Plaintiff's original action involved a wrongful levy claim brought pursuant to § 7426 and 28 U.S.C. § 1346(a)(1). The Court in that case dismissed the complaint filed almost one year after the date of the levy and concluding that it was barred by § 6532(c)(1). The present action involves a claim for refund brought pursuant to 26 U.S.C. § 6511 and alleges jurisdiction premised on 28 U.S.C. § 1346(a). Complaint ¶¶ 3,4. On September 6, 2001, plaintiff filed a claim for refund of the deficiency, which claim was denied. *Id.* ¶ 12. The claim undisputedly involves the same funds taken through the 1999 levy addressed in the prior action, *id.* ¶ 6.

Prior to the Supreme Court's decision in *Williams*, it was beyond dispute that "[s]ection 7426(a)(1) . . . affords the exclusive remedy for an innocent third party whose property is confiscated by the IRS to satisfy another person's tax liability." *Texas Commerce Bank-Fort Worth, NA*, 896 F.2d at 156 (citing *United Sand & Gravel Contractors v. United*

States, 624 F.2d. 733, 739 (5th Cir. 1980)). The Fifth Circuit was not alone in holding that a claim for wrongful levy rather than for a refund was the exclusive remedy. *See, e.g., United States v. Williams*, 947 F.2d 37, 39 (2d Cir. 1991)("[t]he sole remedy available to an individual . . . who claims an interest in property that has been levied upon by the IRS for the purpose of satisfying the tax liability of another person, is a wrongful levy action asserted under 26 U.S.C. § 7426(a)(l)"); *see also Winebrenner v. United States*, 924 F.2d 851, 854-55 (9th Cir. 1991)(same); *Trust Co. of Columbus v. United States*, 735 F.2d 447, 448 (11th Cir. 1984)(same).

Under similar facts involving a wrongful levy in *United Sand and Gravel Contractors*, the Fifth Circuit rejected the plaintiff's attempt to seek an alternative remedy for a wrongful levy in 28 U.S.C. § 2410. The Court noted that "[t]he wrongful levy action under . . . [§] 7426 fits the present case like a glove. . . . United Sand failed to file a timely claim, and thus cannot avail itself of this remedy." *United Sand & Gravel Contractors*, 624 F.2d. at 739 (internal quotation marks omitted). As the available remedy dovetailed neatly with the facts of the case, the Court concluded that

> several of United Sand's theories would make meaningless the nine month limitation contained in [26 U.S.C. §] 6532(c). . . . Because we do not believe Congress intended its provision to be meaningless, and because we hold that [26 U.S.C. §] 7426 is the exclusive remedy against the United States for parties other than taxpayers complaining that their property has been wrongfully levied upon, we affirm the decision below.

United Sand & Gravel Contractors, 624 F.2d. at 739-40. In so stating, the Fifth Circuit held that one entitled to bring a wrongful levy action was in fact obligated to do so.

The Supreme Court decision in *United States v. Williams*, 514 US 527 (1995), cast some doubt on the exclusivity of the wrongful levy remedy. *Williams* involved a lien by the Internal Revenue Service on a home jointly owned by husband and wife. *Id.* at 529. While the lien was against the husband who had incurred the tax liability giving rise to the lien, the husband's interest in the home was transferred, without notice of the existing lien, to the wife as part of a division of assets in divorce proceedings. *Id.* at 529-30. Although the wife was not personally liable, she paid the tax liability under protest to remove the lien, which had been in place for approximately fifteen months, from the property for purposes of selling the home. *Id.* at 530. She then sued for a refund under 28 U.S.C. § 1346(a)(1), which constitutes a waiver of sovereign immunity suit in "[a]ny civil action . . . for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected." *Williams*, 514 U.S. at 530 (internal quotation marks omitted).

The issue before the Court in *Williams* was "whether . . . [an individual] who paid a tax under protest to remove a lien on her property, has standing to bring a refund action under 28 U.S.C. § 1346(a)(1), even though the tax she paid was assessed against a third party." *Id.* at 529. The Court held that "respondent has standing to sue for a refund . . . [as] only a strained reading of other relevant provisions would bar her suit. She had no realistic alternative to payment of a tax she did not owe, and we do not believe Congress intended

to leave parties in respondent's position without a remedy." *Id.* In so holding, the Supreme Court rejected the law of this Circuit, *see Snodgrass v. United States*, 834 F.2d 537, 539-40 (5th Cir.1987), which would have required a contrary result on the question of standing.

The Court of Appeals for the Ninth Circuit thereafter applied *Williams* in denying earlier precedent embracing the exclusivity of the wrongful levy cause of action and permitting the plaintiff to amend its complaint to include a claim for refund pursuant to § 1346(a)(1). *WWSM Investors*, 64 F3d at 458. The majority opinion dismissed, as exalting form over substance, the government's argument that the facts of Williams involved a lien whereas the facts before it involved a levy. *Id.* ("seizing money from WWSM's bank account is functionally equivalent to what the IRS did in *Williams*—placing a lien on property in escrow under circumstances which compelled Mrs. Williams to pay the IRS and discharge the lien. In both cases, the IRS extracted money by compelling one person to pay the tax of another"). The dissenting opinion rejected the majority's dismissal of the argument, concluding that

> In *Williams*, the Supreme Court recognized that Williams could not use the remedy of 26 U.S.C. § 7426 because there was no levy. See 514 U.S. at __, 115 S. Ct. at 1618. *Williams* involved an IRS assessment for certain tax liabilities. A lien, not a levy, was placed on the property. The taxpayer paid the tax liability to remove the lien so the property could be sold and sued the IRS for a refund.

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> The Supreme Court recognized *Williams* as a refund, not a wrongful levy, case, and analyzed the non-levy remedies available: quiet title (§ 2410(a)(1)); separate-fund (§ 6325(b)(3)); and refund (§ 1346(a)(1)). *Id.* 514 U.S. at __-__, 115 S. Ct. at 1618-1620 (Parts IV and V of the opinion). The Supreme Court never mentioned . . . *United Sand and Gravel v. United States*, 624 F.2d 733 (5th Cir.1980), nor did it overrule or even hint that § 7426 was not the exclusive remedy for a claimed wrongful levy. Quite the contrary, the Supreme Court analyzed the various remedies for the various situations, 514 U.S. at __, 115 S. Ct. at 1619, and did not allow that a non-levy remedy under § 1346(a)(1) was available when the exclusive levy remedy under § 7426 was barred by the statute of limitations.
>
> WWSM's only remedy was under § 7426 because this case . . . involves a wrongful levy; *Williams* did not.

WWSM Investors, 64 F3d at 459-60 (Brunetti, J., dissenting).

In *Dahn v. United States*, 127 F.3d 1249, the Tenth Circuit Court of Appeals addressed the exclusivity rule in light of *Williams*. The Court made two observations relevant to the exclusivity of the wrongful levy remedy.

> First, there were no tax levies involved in that case. Thus, the Court was concerned solely with the reach of § 1346 *per se*; the exclusivity of a

> concurrent § 7426 claim was never in issue. Indeed, the Court specifically emphasized the inapplicability of § 7426 (or any other meaningful remedy) to reinforce its broad reading of § 1346. *See Williams*, 514 U.S. at 536,115 S. Ct. at 1617. There is no indication that the Court intended to reach beyond the confines of the case before it and overturn, *sub silentio*, the separate and well-established principle that § 7426 provides the exclusive remedy for a wrongful levy.

Id. at 1253. and

> Second, and in any event, David Dahn clearly does not fall within the exceptional category exemplified by the plaintiff in *Williams*. He did not deliberately and affirmatively proffer payment for the tax liabilities of his parents to obtain the prompt release of property encumbered therefor; he was simply a passive, collateral subject of IRS collection activities. If *Williams* were applicable to this case, anyone claiming financial losses tied to the collection of someone else's taxes could arguably be a "taxpayer" entitled to seek a "refund"—perhaps long after the remedy specifically devised for the situation by Congress had expired. We decline to extend *Williams* in this imprudent and implausible manner.

Id. at 1254.

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Given the foregoing, the holding in *Williams may* be read as *requiring* two possible conclusions in light of the prior law of this Circuit holding that a wrongful levy claim is the exclusive remedy for an aggrieved third party. The first possible conclusion, as pointed out by the *WWSM Investors* majority, would be that it matters little how the third-party claim arises or whether a pre-deprivation was available. Once *a* payment of the taxes of another is made under protest, the payor satisfies the definition of taxpayer under § 1346 and the payor may pursue a refund. *Fidelity and Deposit Co. of Maryland v. City of Adelanto*, 87 F.3d 334, 338 (9th Cir. 1996)("to the extent that a refund action is available, § 7426 is not the exclusive remedy for a wrongful levy"); *Beauchamp v. United States*, 4 F. Supp. 2d 213, 216 (W.D.N.Y. 1998)(noting that "the 'lien vs. levy' distinction advanced by the IRS is not relevant" but further noting that plaintiff in that case was subject to tax and therefore may not be characterized as third party for purposes of wrongful levy action).

The second possible conclusion is that the decision is limited to standing to pursue a refund in the absence of pre-deprivation remedies and therefore has no bearing on the continued viability of the exclusivity rule. *Compagnoni v. United States*, NO. 94-0813-CIV, 1996 WL 636110, at *9 (S.D. Fla. Aug. 30, 1996) (agreeing with "*WWSM dissent*, and conclud[ing] that a taxpayer who—through inadvertence or otherwise—ignores the statute of limitations and relinquishes an otherwise available and satisfactory remedy under section 7426 cannot instead seek relief under section 1346 with its substantially more generous limitations period. . . . [A]ccepting this conclusion would render the rigid

limitations period of section 7426 a virtual nullity and defeat the Congressional goal of ensuring the prompt resolution of wrongful levy claims against the United States"); *see also United Sand and Gravel Contractors, Inc.*, 624 F.2d at 738 (discussing potential for alternative remedy and noting "the intent of Congress to set a short time limit for wrongful levy actions will be completely undercut"). While the conferral of standing to bring such a claim may be read as applying to taxpayers, the conferral of standing does not necessarily require the conclusion that the application of other legal standards, for example statutes of limitations, would not otherwise preclude a favorable outcome on the same claim.

Faced with these two potential readings of the effect of *Williams*, this Court is inclined to adopt the latter. The Supreme Court in *Williams* noted that the plaintiff in that case was otherwise without a realistic remedy. *Williams*, 514 U.S. at 536. Noting the substantial exposition of the facts of the case, the dissent notes that the majority "outlines in some detail what it conceives to be the equities of respondent's situation—a factor not usually of great significance in construing the Internal Revenue Code." *Id* at 542 (Rehnquist, C.J., dissenting). As a result, the majority's determination is inextricably linked to the facts of the particular plaintiff.

> This consequence reinforces our conclusion that Congress did not intend refund actions under § 1346(a)(1) to be unavailable to persons situated as Lori Williams is. Though the Government points to three other remedies, none was realistically open to Williams. Nor would any of

> the vaunted remedies be available to others in her situation.

Id. at 536. As such, this Court, in reconciling the long-standing exclusivity rule and the later Supreme Court decision in *Williams*, is inclined to conclude that *Williams* establishes an equitable exception for those who cannot otherwise avail themselves of pre-deprivation remedies. The facts of the present case, specifically the failure to bring a timely wrongful levy action when notice of the government action is not an issue, does not rise to the level of the facts before the Supreme Court in *Williams*.

This Court cannot read *Williams* as obliterating the requirement that third-parties, under ordinary circumstances, are no longer required to bring a wrongful levy action as such would create instability in federal government property resolutions inherent in the shortened statute of limitation applicable to such claims and would render the cause of action superfluous. While the causes of action is clearly a pre-deprivation remedy in contrast to the post-deprivation remedy of claims for refunds, the issue inherent in both is identical: the possessory interest of the federal government in funds derived from the levy. *Williams* does not sanction a revisitation of a singular issue in separate proceedings, nor does it favor those who fail to act within the applicable statute of limitations.

In light of the continued viability of this Circuit's law establishing wrongful levy as the exclusive remedy for those in plaintiff's circumstances, plaintiff may not avail itself of an applicable waiver of sovereign immunity for its present claim. Plaintiff's complaint is therefore dismissed.

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Defendant's renewed motion to dismiss or in the alternative for summary judgment (Doc. No. 16) is **denied as moot**. The Clerk shall close the file.

SO ORDERED.

Dated at El Paso, Texas, November 22, 2004.

s/ Kathleen Cardone
Kathleen Cardone
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING FILED MARCH 2, 2006

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 05-50068

EC TERM OF YEARS TRUST

Plaintiff - Appellant

v.

UNITED STATES OF AMERICA,

Defendant - Appellee

ON PETITION FOR REHEARING

Before REAVLEY, GARZA and BENAVIDES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

s/ Emilio M. Garza
United States Circuit Judge

FILED
DEC 1 1 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1541

IN THE

Supreme Court of the United States

EC TERM OF YEARS TRUST,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 31, 2006
CERTIORARI GRANTED OCTOBER 27, 2006

APPENDIX A — RELEVANT DOCKET ENTRIES OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, EL PASO DIVISION

EC Term of Years v. United States
Assigned to: Honorable Kathleen Cardone
Demand: $0
Case in other court: 5th Circuit, :05- -50068
Cause: 26:6532 IRS: Refund of Tax Penalty

Date Filed: 09/05/2003
Jury Demand: None
Nature of Suit: 870 Taxes
Jurisdiction: U.S. Government
Defendant

Plaintiff

EC Term of Years Trust represented by

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Appendix A

V.

Defendant

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Appendix A

Date Filed	#	Docket Text
09/05/2003	1	Complaint for Refund of Federal Income Tax filed. Filing Fee: $150.00 Receipt # 345805 (Pages: 3) (jm) (Entered: 09/09/2003)
09/22/2003	7	Motion by United States to dismiss, and/or for summary judgment and brief in support thereof (jm) (Entered: 09/23/2003)
10/03/2003	10	Certificate of service by EC Term of Years trust of Response to Motion to dismiss and/or for summary judgment with brief in support (rc) (Entered: 10/03/2003)
10/09/2003	11	Response by EC Term of Years in opposition to motion to dismiss [7-1], and/or motion for summary judgment and brief in support thereof [7-2]am) (Entered: 10/09/2003)
10/09/2003	12	Reply by United States to response to motion to dismiss [7-1], and/or motion for summary

		judgment and brief in support thereof [7-2] am) (Entered: 10/09/2003)
04/23/2004	13	Order denying motion to dismiss [7-1], denying motion for summary judgment and brief in support thereof [7-2] to show cause (plaintiff) not later than 5/14/04 why action should not be dismissed signed by Judge Kathleen Cardone (dll) (Entered: 04/26/2004)
05/14/2004	14	Response and brief in support by EC Term of Years to scheduling to show cause (plaintiff) not later than 5/14/04 why action should not be dismissed [13-1] (aq) (Entered: 05/14/2004)
06/01/2004	15	Response by United States to response to Order to show cause and brief in support thereof [14-1] (aq) (Entered: 06/01/2004)
11/08/2004	16	Renewed Motion by United States to dismiss, and/or for summary judgment (dll) (Entered: 11/09/2004)

Appendix A

11/22/2004	17	Order dismissing Petition and denying as moot motion to dismiss [16-1], and denying as moot motion for summary judgment [16-2] signed by Judge Cardone (aq) (Entered: 11/23/2004)
11/30/2004	18	Judgment signed by Judge Kathleen Cardone (Pages: 1) (dll) (Entered: 2/01/2004)
12/17/2004	19	Notice of appeal by EC Term of Years Trust (aq) (Entered: 12/20/2004)
03/30/2006	20	Certified copy of judgment of USCA affirming appeal [19-1] (dag) (Entered: 04/06/2006)
11/08/2006	22	ORDER of USCA (certified copy) regarding Petition for a writ of Certiorari is granted; re 19 Notice of Appeal (aq,) (Entered: 11/09/2006)

APPENDIX B — RELEVANT DOCKET ENTRIES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Court of Appeals Docket #: 05-50068 Filed: 1/7/05
Nsuit: 2870 Tax Suits: Taxes
EC Term of Years v. USA
Appeal from: Western District of Texas, El Paso

Lower court information:

District: 0542-3 : 3:03-CV-363
Ordering Judge: Kathleen Cardone, US District Judge
Date Filed: 9/5/03
Date order/judgment: **/**/**
Date NOA filed: 12/17/04

Fee status: Paid

Prior cases:
None
Current cases:
None

EC TERM OF YEARS TRUST

Plaintiff - Appellant

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Appendix B

v.

UNITED STATES OF AMERICA
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Appendix B

EC TERM OF YEARS TRUST

Plaintiff - Appellant

v.

UNITED STATES OF AMERICA

Defendant - Appellee

Appendix B

1/7/05	Tax case from district court docketed. NOA filed by Appellant EC Term of Years. [05-50068] (trm)
2/17/05	Record on appeal filed. Vol(s) of Pleadings: 1. [05-50068] ROA ddl satisfied. (sep)
5/31/05	Appellant's Brief filed by Appellant EC Term of Years. Copies of Brief: 7 # of pages: 18 Date of COS: 5/27/05 Hand Delivered [Y/N]: N Disk Provided [Y/N]: Y Sufficient [Y/N]: Y. [5181753-1] [05-50068] A/Pet's Brief ddl satisfied. E/Res's Brief due on 6/30/05 for USA. Record Excerpts due on 6/13/05 for EC Term of Years. (tdb)
6/10/05	Record excerpts filed by Appellant EC Term of Years # of copies: 4 Sufficient [Y/N]: y. [05-50068] Record Excerpts ddl satisfied. (jca)
6/30/05	Appellee's Brief filed by Appellee USA. Copies of Brief: 7 # of pages: 44 Word count: 9240 Date of COS: 6/29/05 Hand Delivered [Y/N]: n Disk Provided [Y/N]: y Sufficient [Y/N]: y. [5214537-1] [05-50068] E/Res's Brief ddl satisfied. Reply Brief due on 7/14/05 for EC Term of Years. (rfp)
7/26/05	Reply brief filed by Appellant EC Term of Years. Copies of Brief: 7 of pages: 6 Date of COS: 7/25/05 Disk Provided [Y/N]: y Sufficient [Y/N]: y. [5240838-1] [05-50068] Reply Brief ddl satisfied. (rfp)

Appendix B

11/9/05	Oral argument heard. Case argued by Teresa T Milton for Appellee USA, Francis Swinburne Ainsa for Appellant EC Term of Years [05-50068] (sme)
1/3/06	Opinion filed. Issd in T form? y Mandate pull date is 2/24/06. [05-50068] (jma)
1/3/06	Judgment entered and filed. [05-50068] (jma)
2/17/06	Petition filed by Appellant EC Term of Years for rehearing. # of copies filed: 4 [5374949-1] Mandate pull date canceled. Date of COS: 2/16/06 Sufficient [Y/N]: Y [05-50068] (mcs)
3/2/06	COURT Order filed denying appellant's petition for rehearing [5374949-1] Mandate pull date is 3/9/06. Copies to all counsel. [05-50068] (lcb)
3/10/06	Mandate issued. Approved BOC Issued (Y/N)?: n [05-50068] Mandate pull date satisfied. (gmr)
6/7/06	Supreme Court notice that petition for certiorari was filed on 05/31/06 by Appellant EC Term of Years. Sup.ct. No.: 05-1541 [05-50068] (cav)
11/7/06	Supreme Court order received granting petition certiorari [5467396-1] by Appellant EC Term of Years on 10/27/06. [05-50068] (cav)
11/7/06	Certified record on appeal transmitted to United States Supreme Court. 5th Cir. Vols: 1. [05-50068] (mcs)

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT WESTERN DISTRICT OF TEXAS, EL PASO DIVISION FILED APRIL 23, 2004

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

Civil No. EP-03-CA-363(KC)

EC TERM OF YEARS TRUST,

Plaintiff,

-vs-

UNITED STATES OF AMERICA,

Defendant.

ORDER

Defendant moves to dismiss, or in the alternative for summary judgment on, the present claims as barred by res judicata. For the reasons set forth herein, the motions to dismiss or in the alternative for summary judgment are **denied.** Plaintiff is further ordered to show cause not later than May 14, 2004 why the present complaint should not be dismissed for lack of subject matter jurisdiction.

I. BACKGROUND

On September 7, 2000, plaintiff, one of several trusts created by Elmer Cullers, Jr. and Dorothy Cullers, filed a

complaint alleging wrongful levy pursuant to 26 U.S.C. § 7426, for a tax lien filed in 1999 as an effort to collect a tax deficiency assessed against the Cullers for tax years 1981 through 1984. The Internal Revenue Service contended that the trusts were established by the Cullers for purposes of avoiding payment of federal income taxes and that the trusts were in fact the Cullers's alter egos. On October 5, 1999, plaintiff paid the Cullers's deficiency under protest and then sought to recoup amounts paid. In December 1999 and January 2000, plaintiff was notified that it still owed interest and penalties on the deficiency. On January 3, 2000, plaintiff demanded return of the deficiency taken under levy. *BSC Term of Years Trust v. United States,* 2000 WL 33155870, No. EP-00-CA-270-H, at *1 (W.D. Tex. Dec. 28, 2000).

Defendant moved to dismiss the complaint, arguing that a courtesy copy of the January 3, 2000 was incorrectly addressed and therefore plaintiffs did not notify defendant within the statute of limitations for a wrongful levy claim set forth in 26 U.S.C. § 6532(c). *Id* at *2. By order dated December 28, 2000, the Court noted that plaintiff's claim was brought under § 7426, *id,* and 28 U.S.C. § 1346(a)(1), *id.* at *2 n.1. The Court stated that "§ 7426 'affords the exclusive remedy for an innocent third party whose property is confiscated by the IRS to satisfy another person's tax liability," *id.* (quoting *Tex. Commerce Bank of Fort Worth, N.A. v. United States,* 896 F.2d 152, 156 (5th Cir. 1990)), and as such plaintiff "may not pursue a remedy under § 1346." *Id.* The Court concluded that plaintiff filed their suit almost one year after the date of the levy, *id.* at *2, and the claim was therefore barred by § 6532(c)(1), *id.* at *3, and the Court

was therefore without subject matter jurisdiction to resolve plaintiff's claim, *id.* at *1.

The present action involves a claim for refund brought pursuant to 26 U.S.C. § 6511 and alleges jurisdiction premised on 28 U.S.C. § 1346(a). Complaint ¶¶ 3,4. On September 6, 2001, plaintiff filed a claim for refund of the deficiency, which claim was denied. *Id.* ¶ 12. The claim undisputedly involves the same funds taken through the 1999 levy addressed in the prior action, *id.* ¶ 6.

II. ANALYSIS

Defendant moves to dismiss, or in the alternative for summary judgment on, the present claims claiming a prior order dismissing a wrongful levy claim is res judicata as to the present claim.

A. Standard

Defendant does not specify a specific basis for its motion to dismiss, thus this Court will specify the specific standard applicable to motions to dismiss for lack of subject matter jurisdiction and for failure to state a claim as well as for a motion for summary judgment.

A case may be dismissed for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) when a court lacks the statutory or constitutional power to adjudicate. *Home Builders Assoc' of Miss., Inc. v. City of Madison,* 143 F.3d 1006, 1010 (5th Cir. 1998). In resolving such a motion, a court may refer to evidence

outside the pleadings. *Espinoza v. Mo. Pacific R. Co.*, 754 F.2d 1247, 1248 n.1 (5th Cir. 1985). When the jurisdictional issue is of a factual nature rather than facial, plaintiff must establish subject matter jurisdiction by a preponderance of the evidence. *Irwin v. Veterans Admin.*, 874 F.2d 1092, 1096 (5th Cir. 1989).

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) is properly granted "only if it appears that no relief could be granted under any set of facts that could be proven consistent with the allegations." *Rosborough v. Mgmt. & Training Corp.*, 350 F.3d 459, 460 (5th Cir. 2003) (internal quotation marks omitted). The truth of material facts alleged in the complaint is assumed, *Davis Next Friend LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999), and all allegations are viewed in a light most favorable to the plaintiff. *Mowbray v. Cameron County, Tex.*, 274 F.3d 269, 276 (5th Cir. 2001).

A party moving for summary judgment must establish that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law. FED. R. CIV. P. 56 (c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In determining whether a genuine issue has been raised, all ambiguities are resolved and all reasonable inferences are drawn against the moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962); *S & W Enters., LLC v. Southtrust Bank*, 315 F.3d 533, 537 (5th Cir. 2003). Summary judgment is proper when reasonable minds could not differ as to the import of evidence. *Anderson*, 477 U.S. at 251. The weight of evidence and the credibility of witnesses are not proper considerations in deciding a motion

for summary judgment as such concerns are exclusively for the jury. *Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir. 1998).

B. Analysis

The doctrine of res judicata, read in its broadest sense, includes two distinct preclusion concepts: claim preclusion, also referred to as res judicata, and issue preclusion, or collateral estoppel.[1] *United States v. Shanbaum*, 10 F.3d 305, 310 (5th Cir. 1994). Four conditions must be established for claim preclusion: (1) the parties in a later action must be identical or in privity with the parties in a prior action, (2) a court of competent jurisdiction must render the judgment in the prior action, (3) the prior action must conclude with a final judgment on the merits and (4) both suits must involve the same claim or cause of action. *Id.* Once established, claim preclusion prohibits the assertion of "any claim or defense in the later action that was or could have been raised in support of or in opposition to the cause of action asserted in the prior action," or otherwise, "the effect of a judgment extends to the litigation of all issues relevant to the same claim between the same parties, whether or not raised at trial." *Id.* (internal quotation marks omitted).

Plaintiff agrees, as it must, that the above constitutes the appropriate res judicata standard and argues only that

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1. The standard identified by defendant is one of claim preclusion rather than issue preclusion. Issue preclusion serves the interests of judicial economy by treating as final and conclusive specific issues of fact or law that were validly and necessarily determined between two parties through prior litigation. *Id.* at 311.

the Order dismissing the case on subject matter jurisdiction grounds does not constitute a final judgment on the merits. In so arguing, plaintiff refers to the proposition that "[d]ismissals for want of jurisdiction are not decisions on the merits, while those based on limitations are." *Nilsen v. City of Moss Point*, 701 F.2d 556, 561 (5th Cir. 1983). While such dismissals are "paradigms of non-merits adjudication," merely classifying an action, regardless of the merits as one on which a court may not speak, a statute of limitations determination "assumes or decides that the court could have spoken but refuses to do so beyond declaring the claim to be stale." *Id.* at 562. A time bar determination thereby "bars not only the stale claim asserted but any others, though themselves still timely, that are part of the same cause of action." *Id.*

Plaintiff thus seizes on the Court's characterization of the dismissal as premised on want of subject matter jurisdiction while defendant implicitly characterizes the dismissal as premised on a statute of limitations. While sovereign immunity, as addressed in the prior order, ultimately implicates subject matter jurisdiction to decide claims against the Government, courts have not hesitated to characterize the statute of limitations proscribing waivers of sovereign immunity as such[2]. *United States v. Land*, 213 F.3d

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2. The waiver of sovereign immunity "A statute of limitations requiring that a suit against the Government be brought within a certain time period is one of those terms. . . . [A]lthough we should not construe such a time-bar provision unduly restrictively, we must be careful not to interpret it in a manner that would 'extend the waiver beyond that which Congress intended.'" *United States v. Dalm*, 494 U.S. 596, 608 (1990).

830, 837 (5th Cir. 2000) (in addressing Tucker Act claim involving landowner and failure to bring action within applicable statute of limitations, "dismissals of . . . claims [on statute of limitations grounds] are . . . res judicata"); *Jackson v. Widnall,* 99 F.3d 710, 715 n.8 (5th Cir. 1998) (indicating that dismissal on statute of limitations ground is a judgment on the merits for res judicata purposes).

While the Court relied on the statute of limitations applicable to § 7426 in dismissing the action, the § 1346(a)(1) was also dismissed under that statute of limitations. The Court relied on *Texas Commerce Bank of Fort Worth, NA.,* 896 F.2d 152, in concluding that § 7426 afforded a third-party the exclusive remedy for § 1346(a)(1) and thereby merged the two claims into a single § 7426 claim for purposes of dismissal. While the District Court correctly recited the *Texas Commerce Bank of Fort Worth, N.A.* holding, the absolutism of the proposition set forth in the holding has been diminished to some degree by the Supreme Court decision in *United States v. Williams,* 514 U.S. 527 (1995). *Williams* was decided after the *Texas Commerce Bank of Fort Worth, NA.* decision but prior to the District Court's decision and addresses the possibility of § 1346(a)(1) claims by third-party plaintiffs outside the § 7426 statute of limitations. At a minimum, it cannot be said that the § 1346(a)(1) claim was decided on statute of limitations grounds as such a conclusion presupposes that § 1346 incorporates the § 7426 statute of limitations. This Court therefore cannot afford that portion of the District Court's order on the § 1346 claim more deference than that given a dismissal on subject matter jurisdiction. As such, the § 1346 claim would not be considered dismissed on the merits for res judicata purposes.

Appendix C

Notwithstanding plaintiff's concession as to the relevant elements for a res judicata determination, this Court would question the fourth element pertaining to the same claim or cause of action involved as well as the third element. "[T]he principal test for comparing causes of action is whether the primary right and duty or wrong are the same in each action." *Nilsen,* 701 F.2d at 559. "[O]ne who has a choice of more than one remedy for a given wrong . . . may not assert them serially, in successive actions, but must advance all at once on pain of bar." *Id.* at 560. "[A]ny inquiry as to the application of the doctrine of res judicata must go beyond the procedural vehicle utilized to a pragmatic assessment of whether or not the primary right and duty and delict or wrong are the same in each action." *Id.* at 561 (internal quotation marks omitted).

Two considerations cast doubt on whether the two causes of action would be deemed separate causes of action for purposes of res judicata. The Supreme Court in *Williams* distinguished between pre-deprivation and post-deprivation, with § 1346(a)(1) identified as post-deprivation relief and § 7426(a)(1) identified as affording pre-deprivation relief. *Williams,* 514 U.S. at 538. A claim for refund would logically be characterized as post-deprivation as one may not seek a refund on that which he or she has not yet paid to the Government. As such, the two procedures could, under the appropriate facts, be considered mutually exclusive, representing separate stages in a procedural continuum. Additionally, as the present action involves a civil action on a claim for refund, a plaintiff may not initiate such an action unless such plaintiff has exhausted administrative remedies in pursuing such refund. *Williams,* 514 U.S. at 527; 26 U.S.C. § 7422(a). Given the interaction of the nine-month statute of

limitations on a wrongful levy claim and the exhaustion requirements in refund claims, it does not necessarily follow that the two claims would be expected to arise contemporaneously. As such, a refund would require the additional fact of exhaustion and would not constitute "the same nucleus of operative facts as the prior complaint." *Jackson v. Widnall,* 99 F.3d 710, 715 n.8 (5th Cir. 1998).

The foregoing indicates only that res judicata is not an appropriate vehicle for dismissing the present complaint. The foregoing should not be read as a conclusion that plaintiff's claim is properly before this Court. "Article III generally requires a federal court to satisfy itself of its jurisdiction over the subject matter before it considers the merits of a case." *Ruhrgas AG v. Marathon Oil Co.,* 526 U.S. 574, 583 (1999). Suits against the Government, as involved in the present case, necessarily implicate principles of sovereign immunity. Sovereign immunity is jurisdictional in nature. *FDIC v. Meyer,* 510 U.S. 471, 475 (1994). "[T]he United States, as sovereign, is immune from suit, save as it consents to be sued ... and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *Dalm,* 494 U.S. at 608 (internal quotation marks omitted). Plaintiff must therefore demonstrate to the satisfaction of this Court that the present claim falls within an appropriate waiver of sovereign immunity and thus there is jurisdiction to hear the present claim.

It is without question that *Williams* adds a degree of complexity to what was originally a single standard applicable to all third-party claims involving levies. At present, this Court is inclined to conclude that the decision

of the Tenth Circuit Court of Appeals in *Dahn v. United States,* 127 F.3d 1249, 1253-54 (10th Cir. 1997), essentially holding that *Williams* should be limited to the exceptional facts presented therein, is applicable given the earlier precedent of the Fifth Circuit Court of Appeals while the application of *Williams* by the Ninth Circuit Court of Appeals in *WWSM Investors v. United States,* 64 F.3d 456 (9th Cir. 1995) (declining to limit *Williams* to its facts), sweeps too broadly. *Dahn* adheres to the exclusivity of wrongful levy actions to one in plaintiff's position while *WWSM Investors* calls such exclusivity further into doubt. The Tenth Circuit declined to extend Williams, noting the peculiar outcome of such an extension where "anyone claiming financial losses tied to the collection of someone else's taxes could arguably be . . . entitled to seek a 'refund'—perhaps long after the remedy specifically devised for the situation by Congress had expired." *Dahn,* 127 F.3d at 1254. This Court would similarly find it surprising that a party could sit on his or her rights, or in fact litigate a matter as a wrongful levy, then return with a subsequent civil action on a claim for a refund.

It is further noteworthy that the Supreme Court in *Williams* repeatedly refers to the plaintiff's circumstances through phrases like "people in Williams' position without a remedy," "to persons situated as Lori Williams is," "to someone in Williams' position" *Williams,* 514 U.S. at 536, "Williams and persons similarly situated," *id.* at 537, "people caught in Williams' bind," *id* at 538, and "permit[ting] persons in Williams' position to bring refund suits," *id.* at 540. The case further involved a lien rather than a levy, *id.*, and as such the two are different devices with different legal

effects.[3] *United States v. Cache Valley Bank*, 866 F.2d 1242, 1244-45 (10th Cir. 1989). In light of the foregoing, this Court would likely conclude that a wrongful levy claim was plaintiff's sole remedy and it may not effectively get a second bite at the apple having missed the applicable statute of limitations on its wrongful levy claim.

Given the foregoing, this Court will not dismiss the present case without first affording plaintiff the opportunity to address the legal concerns raised above. It is therefore ORDERED that plaintiff shall show cause on or before May 14, 2004 why the present complaint should not be dismissed for lack of subject matter jurisdiction.

A failure of plaintiff to respond by said date shall be construed as a manifestation of consent to such dismissal. Defendant shall have ten days from the filing of such response to file its reply.

III. CONCLUSION

Defendant's motions to dismiss (Doc. No. 7-1) or in the alternative for summary judgment (Doc. No. 7-2) are **denied.** Plaintiff is ordered to show cause not later than May 14, 2004 why the present action should not be dismissed.

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3. It is further noted that amendments to the lien provisions of the Internal Revenue Code in 1998 may address the very factual scenario presented in *Williams*, thereby potentially further limiting the impact of the case under its own facts. 26 U.S.C. §§ 6325(b)(4), 7426(a)(4).

Appendix C

SO ORDERED.

Dated at El Paso, Texas, April 23, 2004.

s/ Kathleen Cardone
Kathleen Cardone
United States District Judge

APPENDIX D — COMPLAINT FOR REFUND OF FEDERAL INCOME TAX DATED AND FILED SEPTEMBER 5, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

Cause No. EP03CA0363

EC Term of Years Trust,

Plaintiff,

v.

United States of America,

Defendant.

COMPLAINT FOR REFUND OF FEDERAL INCOME TAX

1. EC Term of Years Trust is a trust created under the laws of the State of Texas. Its principal place of business is in El Paso, El Paso County, Texas. It's [sic] Managing Trustee is also a resident of El Paso, El Paso County, Texas.

2. The Defendant is the United States of America. Pursuant to F.R.C.P. 4(i), service of process can be had by serving the summons and a copy of the complaint to the United States Attorney, Mr. Johnny K. Sutton, Attention Ms. Vernell Everett, 601 N.W. Loop 410, San Antonio, TX 78216; and by sending a copy of the complaint and summons to the Attorney General of the United States, Mr. John Ashcroft,

Appendix D

U.S. Department of Justice, 950 Pennsylvania Avenue, N.W., Room 4545, Washington, D.C. 20530-0001, and to the Internal Revenue Service, Stop 5021AUS, 300 E. 8th Street, Austin, TX 78701.

3. This is a suit arising under 26 U.S.C. 6511 for denial of a claim for refund filed by Plaintiff.

4. Jurisdiction is conferred upon this Court by virtue of Title 28, §1346(a) of the United States Code.

5. The Internal Revenue Service has never assessed any tax against the Plaintiff under Section 6901 of the Internal Revenue Code.

6. By Notice of Levy (Form 668A) dated September 10, 1999, a copy of which is attached hereto as Exhibit A and by this reference made a part hereof, the Internal Revenue Service levied against the account of Plaintiff for personal income taxes (Form 1040) for the years 1981 1982, 1983 and 1984, which amounts are claimed to be due and owing by Elmer W. Cullers, Jr. and Dorothy Cullers (the "Cullers") to the United States Government, pursuant to Internal Revenue Code.

7. Plaintiff was created prior to any assessment of taxes against the Cullers for the tax years shown on Exhibit A.

8. The account levied was owned by Plaintiff.

9. The Cullers do not have and have never had any ownership interest, legal or equitable, in Plaintiff's account.

10. The time period for assessing the tax against the Plaintiff for transferee liability had expired at the time the levy was made.

11. The levy against the Plaintiff is erroneous and illegal.

12. On September 6, 2001, Plaintiff filed a claim for a refund, a copy of which is attached as Exhibit B. Even though the claim for refund was proper and should have been paid, it was denied.

13. Plaintiff is the sole owner of this claim against the Defendant and has made no assignment of this claim.

WHEREFORE, Plaintiff prays for judgment against the Defendant in the amount of $3,389,426.37, together with legal fees, costs, and interest as provided by law, and for such other and further relief as the Court may deem appropriate.

DATED this 5th day of September, 2003.

Respectfully submitted,

AINSA HUTSON, LLP
5809 Acacia Circle
El Paso, Texas 79912
Telephone: (915) 845-5300
Facsimile: (915) 845-7800

By: s/ Francis S. Ainsa, Jr.
FRANCIS S. AINSA, JR.
Bar Card No. 00949000

(Rev. August 1998)

Notice [illegible]

DATE: SEPTEMBER 10, 19[illegible] DISTRICT: SOUTH TEXAS

TELEPHONE NUMBER OF IRS OFFICE:

REPLY TO: INTERNAL REVENUE SERVICE
700 E. SAN ANTONIO C101
STOP 5240ELP
EL PASO, TX 79901
ATTN: JOHN WOOD

(915) 534-6490

NAME AND ADDRESS OF TAXPAYER:
E C TERM OF YEARS TRUST, JOHN CU
TRUSTEE
AS NOMINEE, ALTER EGO AND/OR TRA
ELMER W. AND DOROTHY CULLERS
7170 WESTWIND 101
EL PASO, TX 79912

TO: CHASE BANK OF TEXAS, N.A.
201 E. MAIN
EL PASO, TX 79901

Acct. No.: 72061157129
IDENTIFYING NUMBER(S): [redacted]

THIS ISN'T A BILL FOR TAXES YOU OWE. THIS IS A NOTICE OF LEVY WE ARE USING TO COLLECT MONEY OWED BY THE TAXPAYER NAMED ABOVE.

Kind of Tax	Tax Period Ended	Unpaid Balance of Assessment	Statutory Additions	Total
1040	12/31/81	1,061,103.44	278,972.15	1,340,075.59
1040	12/31/82	974,214.79	280,251.80	1,254,466.59
1040	12/31/83	438,573.65	320,801.74	759,375.39
1040	12/31/84	26,378.94	9,129.86	35,508.80

THIS LEVY WON'T ATTACH FUNDS IN IRAs, SELF-EMPLOYED INDIVIDUALS' RETIREMENT PLANS, OR ANY OTHER RETIREMENT PLANS IN YOUR POSSESSION OR CONTROL, UNLESS IT IS SIGNED IN THE BLOCK TO THE RIGHT. →

Total Amount Due ▶ 3,389,426.37

We figured the interest and late payment penalty to SEPTEMBER 30, 1999

The Internal Revenue Code provides that there is a lien for the amount that is owed. Although we have given the n and demand required by the Code, the amount owed hasn't been paid. This levy requires you to turn over to us person's property and rights to property (such as money, credits, and bank deposits) that you have or which you are alr obligated to pay this person. However, don't send us more than the "Total Amount Due."

Money in banks, credit unions, savings and loans, and similar institutions described in section 408(n) of Internal Revenue Code must be held for 21 calendar days from the day you receive this levy before you send us money. Include any interest the person earns during the 21 days. Turn over any other money, property, cre etc. that you have or are already obligated to pay the taxpayer, when you would have paid it if this person asked payment.

Make a reasonable effort to identify all property and rights to property belonging to this person. At a minimum, se your records using the taxpayer's name, address, and identifying numbers(s) shown on this form. Don't offset money person owes you without contacting us at the telephone number shown above for instructions. You may not subtra processing fee from the amount you send us.

Receipt Acknowledged:

To respond to this levy:

1. Make your check or money order payable to UNITED STATES TREASURY [illegible] Service.
2. Write the taxpayer's name, identifying number(s), kind of tax and tax period shown on this form, and "LEVY PROCEE on your check or money order (not on a detachable stub.).
3. Complete the back of Part 2 of this form and mail it to us with your payment in the enclosed envelope.
4. Keep Part 1 of this form for your records and give the taxpayer Part 3 within 2 days.

If you don't owe any money to the taxpayer, please complete the back of Part 2, and mail that part back to us in enclosed envelope.

Signature of Service Representative

Title
REVENUE OFFICER

Exhibit A

BEST AVAILABLE COPY

EXHIBIT B — LETTER FROM FRANCIS S. AINSA, JR. OF AINSA HUTSON, LLP TO DISTRICT DIRECTOR, INTERNATIONAL REVENUE SERVICE RE: CLAIM FOR REFUND DATED SEPTEMBER 6, 2001

AINSA HUTSON, LLP
Attorneys & Counselors

A Limited Liability Partnership
5809 Acacia Circle
El Paso, Texas 79912
Tel: (915) 845-5300
Fax: (915) 845-7800

Francis S. Ainsa, Jr.
Email: fain@acaciapark.com

September 6, 2001

District Director
Internal Revenue Service
300 E. 8th Street
Austin, TX 73301

Re: Claim for Refund

Dear Sir:

I represent the entity named in paragraph 1 below. I have attached a copy of a power of attorney from my client for your files.

1. This Claim for Refund is being made by EC Term of Years Trust, an entity created under the laws of the State of Texas (the "Claimant").

Exhibit B

2. This Claim for Refund is being made under 26 U.S.C. 6511 and any other federal statutes applicable to the facts set forth below.

3. This Claim is based upon the payment by Claimant of $3,489,426.37 to the Internal Revenue Service (the "IRS") pursuant to a Notice of Levy, dated September 10, 1999, a copy of which is attached as Exhibit A. The Notice of Levy was issued to collect personal income taxes (Form 1040), penalties and interest for the years 1981, 1982, 1983, and 1984 assessed against Elmer W. Cullers, Jr. [SSN redacted] and Dorothy Cullers (the "Cullers").

4. The IRS has treated Claimant as the nominee or alter ego of the Cullers as shown on the Notice of Levy. The IRS never assessed any tax against the Claimant. The time period for assessing the tax against the Claimants for transferee liability has expired.

5. During 1981, 1982, 1983 and 1984, the Cullers invested in Mid Continent Drilling Associates (the "Partnership"). In 1986, the IRS notified the Cullers that their deductions from losses in the Partnership were being disallowed. The Cullers, both through the Partnership and individually, contested the IRS's disallowance of their deductions. Ultimately, the United States Tax Court held that the Partnership was an abusive tax shelter and that deductions claimed by its partners would be disallowed. Subsequently, the IRS assessed taxes, penalties and interest against the Cullers. The fact that the Cullers owed taxes, penalties and interest is not disputed.

Exhibit B

6. The Claimant is a trust created by the Cullers under the laws of the State of Texas. The Claimant was organized under an estate plan created by the Cullers in 1991 to reduce the impact of federal estate taxes on their estates. In April 1991, the Cullers transferred a substantial portion of their property to Claimant for a term of years. Subsequently, the Cullers transferred their remainder interest in the property conveyed to Claimant in consideration of the payment of a monthly annuity. Even though Claimant was lawfully created solely for the purpose of reducing federal estate taxes on the Cullers estates, the IRS took the position that:

> (a) the transfer of property from Cullers to Claimant was done with actual intent to defraud the IRS and prevent it from collecting the taxes, penalties and interest previously assessed against the Cullers; and,
>
> (b) there was no consideration for the transfer of property by the Cullers to Claimant; and
>
> (c) the Cullers transferred a substantial portion of their property to Claimant to place such property beyond the reach of the IRS; and
>
> (d) Claimant was nothing more than the alter ego or nominee of the Cullers and should be disregarded; and,
>
> (e) the Cullers violated the Texas Uniform Fraudulent Transfer Act in making the transfer of property to Claimant such that the transfer to

Exhibit B

Claimant should be set aside and the property restored to the Cullers and thereby made available to satisfy the tax obligation owed by the Cullers.

7. The IRS filed a tax lien against Claimant in 1999, a copy of which is attached as Exhibit B.

8. In 1999, the IRS threatened to take all available legal action against Claimant to seize its property and sell it to pay the taxes, penalties and interest owed by the Cullers. In order to avoid disruption of its business affairs, Claimant requested that the IRS provide the total amount of taxes, penalties and interest owed by the Cullers. Claimant then deposited such amount, which equaled $3,389,426.37, in its account in Chase Bank of Texas, N.A., 201 E. Main, El Paso, Texas. The IRS then issued its Notice of Levy attached as Exhibit A and the amount levied was paid to the IRS on October 5, 1999 as shown by the check attached as Exhibit C.

9. On September 10, 1999, the Cullers did not have and never have had any ownership interest, legal or equitable, in Claimant's account at Chase Bank of Texas which was levied. Further, Claimant was not on September 10, 1999 and is not now the alter ego or nominee of the Cullers. The property transferred to Claimant was transferred for a good and valuable consideration without any intention to defraud the IRS, or prevent it from collecting taxes assessed against the Cullers and without being in violation of the Texas Uniform Fraudulent Transfer Act.

Exhibit B

10. Claimant is the sole owner of this claim and has made no assignment of this claim.

Claimant is requesting a refund of the amount of $3,389,426.37 which was paid to the Internal Revenue Service under the Notice of Levy attached as Exhibit A.

DATED this 6th day of September 2001.

Respectfully submitted,

AINSA HUTSON, LLP
5809 Acacia Circle
El Paso, Texas 79912
Telephone: (915) 845-5300
Facsimile: (915) 845-7800

By: s/ Francis S. Ainsa, Jr.
FRANCIS S. AINSA, JR.
Bar Card No. 00949000

cc: John Cullers, Trustee

(Rev. August 1990) NOTICE OF LEVY

DATE: SEPTEMBER 10, 19 DISTRICT: SOUTH TEXAS

TELEPHONE NUMBER OF IRS OFFICE:

(915) 534-6490

REPLY TO: INTERNAL REVENUE SERVICE
700 E. SAN ANTONIO C101
STOP 5240ELP
EL PASO, TX 79901
ATTN: JOHN WOOD

NAME AND ADDRESS OF TAXPAYER:
E C TERM OF YEARS TRUST, JOHN CU
TRUSTEE
AS NOMINEE, ALTER EGO AND/OR TRA
ELMER W. AND DOROTHY CULLERS
7170 WESTWIND 101
EL PASO, TX 79912

TO: CHASE BANK OF TEXAS, N.A.
201 E. MAIN
EL PASO, TX 79901

Acct. No.: 72061157129
IDENTIFYING NUMBER(S): [redacted]

THIS ISN'T A BILL FOR TAXES YOU OWE. THIS IS A NOTICE OF LEVY WE ARE USING TO COLLECT MONEY OWED BY THE TAXPAYER NAMED ABOVE.

Kind of Tax	Tax Period Ended	Unpaid Balance of Assessment	Statutory Additions	Total
1040	12/31/81	1,061,103.44	278,972.15	1,340,075.59
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1040	12/31/83	438,573.65	320,801.74	759,375.39
1040	12/31/84	26,378.94	9,129.86	35,508.80

THIS LEVY WON'T ATTACH FUNDS IN IRAs, SELF-EMPLOYED INDIVIDUALS' RETIREMENT PLANS, OR ANY OTHER RETIREMENT PLANS IN YOUR POSSESSION OR CONTROL, UNLESS IT IS SIGNED IN THE BLOCK TO THE RIGHT. → Total Amount Due ▶ 3,389,426.37

We figured the interest and late payment penalty to SEPTEMBER 30, 1999

The Internal Revenue Code provides that there is a lien for the amount that is owed. Although we have given the n and demand required by the Code, the amount owed hasn't been paid. This levy requires you to turn over to us person's property and rights to property (such as money, credits, and bank deposits) that you have or which you are alr obligated to pay this person. However, don't send us more than the "Total Amount Due."

Money in banks, credit unions, savings and loans, and similar institutions described in section 408(n) of Internal Revenue Code must be held for 21 calendar days from the day you receive this levy before you send us money. Include any interest the person earns during the 21 days. Turn over any other money, property, cre etc. that you have or are already obligated to pay the taxpayer, when you would have paid it if this person asked payment.

Make a reasonable effort to identify all property and rights to property belonging to this person. At a minimum, se your records using the taxpayer's name, address, and identifying numbers(s) shown on this form. Don't offset money person owes you without contacting us at the telephone number shown above for instructions. You may not subtra processing fee from the amount you send us.

Receipt Acknowledged:

To respond to this levy:
1. Make your check or money order payable to UNITED STATES TREASURY
2. Write the taxpayer's name, identifying number(s), kind of tax and tax period shown on this form, and "LEVY PROCEE on your check or money order (not on a detachable stub.).
3. Complete the back of Part 2 of this form and mail it to us with your payment in the enclosed envelope.
4. Keep Part 1 of this form for your records and give the taxpayer Part 3 within 2 days.

If you don't owe any money to the taxpayer, please complete the back of Part 2, and mail that part back to us in enclosed envelope.

Signature of Service Representative | Title
REVENUE OFFICER

Exhibit A

20 COU RECORDING DATA

INTERNAL REVENUE SERVICE ACSIMILE FEDERAL TAX LIEN DOCUMENT	Recording Number: UCC Number Liber Page
trict: SOUTH TEXAS	IRS Serial Number: 749957821

This Lien Has Been Filed in Accordance with
Internal Revenue Regulation 301.6323(f)-1.

: of Taxpayer :
: TERM OF YEARS TRUST,JOHN CULLERS TRUSTEE,AS NOMINEE,ALTER; Nominee of
EGO AND/OR TRANSFEREE OF ELMER W.
CULLERS,JR.,AND DOROTHY CULLERS

dence :
)07 WESTWIND
. PASO, TX 79912-1729

th respect to each assessment below, unless notice of lien
. refiled by the date in column(e), this notice shall constitute
:e certificate of release of lien as defined in IRC 6325(a).

m	Period (b)	ID Number (c)	Assessed (d)	Refile Deadline (e)	Unpaid Balance (f)
0	12/31/1981	[redacted]	02/09/1993	03/11/2003	1060399.44
0	12/31/1982		02/09/1993	03/11/2003	974214.79
0	12/31/1983		05/09/1994	06/08/2004	438573.65
0	12/31/1984		05/09/1994	06/08/2004	26378.94

d at: Real Property El Paso County El Paso, TX 79900	Total	$ 2499566.82

notice was prepared and executed at Austin, TX
his, the 11th day of August, 1999.

orizing Official: JOHN A. WOOD (915) 534-6490	Title: Revenue Officer 74-01-2429

Exhibit B

CHASE BANK OF TEXAS
NATIONAL ASSOCIATION
EL PASO, TEXAS 79901
Member FDIC

CHASE

A 7200020156

DATE 10/05/1999

CASHIER'S CHECK

REMITTER EC TERM OF YEARS TRUST

PAY TO THE ORDER OF x-x-x-x-UNITED STATES TREASURY.-x-x-x- $3.369.426.37

CHASE DOWNTOWN

A 90 day waiting period and an indemnifying Bond is required to replace this check.

AUTHORIZED SIGNATURE

"7200020156" ⑆100115⑆ "0010999796"

CHASE BANK OF TEXAS, NATIONAL ASSOCIATION

CHASE

DEBIT

Date 10.5.99 Account BAC 7941

Prepared by [illegible] Phone # 915 546 2452

App. By [illegible] Phone # 1 915 546-6699

IMPORTANT: AMOUNT CANNOT BE GREATER THAN 99,999,999.99

EC Term of years trust

REASON	AMOUNT
Check to: United States Treasury	

CASHIERS CHECK 220
35 (PCS-OCT-99 10:40
FEE WAIVED

720611571129

ACCOUNT # 720611571129 ---|4---- $FLICA 3,369,426.37

Exhibit C

Form **2848**
(Rev. December 1997)
Department of the Treasury
Internal Revenue Service

Power of Attorney and Declaration of Representative

▶ See the separate instructions.

OMB No. 1545-0150

For IRS Use Only
Received by:
Name
Telephone
Function
Date / /

Part I Power of Attorney (Please type or print.)

1 Taxpayer Information (Taxpayer(s) must sign and date this form on page 2, line 9.)

Taxpayer name(s) and address	Social security number(s)	Employer identification number
E C Term of Years Trust 7170 Westwind, Ste. 101 El Paso, TX 79912		74 6387686
	Daytime telephone number 915-584-5600	Plan number (if applicable)

hereby appoint(s) the following representative(s) as attorney(s)-in-fact:

2 Representative(s) (Representative(s) must sign and date this form on page 2, Part II.)

Name and address	CAF No. / Telephone No. / Fax No. / Check if new: Address ☐ Telephone No. ☐
Francis S. Ainsa, Jr. 5809 Acacia Circle El Paso, TX 79912	915-845-5300 915-845-7800
Name and address	CAF No. Telephone No. Fax No. Check if new: Address ☐ Telephone No. ☐
Name and address	CAF No. Telephone No. Fax No. Check if new: Address ☐ Telephone No. ☐

to represent the taxpayer(s) before the Internal Revenue Service for the following tax matters:

3 Tax matters

Type of Tax (Income, Employment, Excise, etc.)	Tax Form Number (1040, 941, 720, etc.)	Year(s) or Period(s)
Income	Form 668-A(c) Notice of Levy	1999
	(Attached as Exhibit A)	

4 **Specific use not recorded on Centralized Authorization File (CAF).** If the power of attorney is for a specific use not recorded on CAF, check this box. (See instruction for Line 4—Specific uses not recorded on CAF.) . . . . . ▶ ☐

5 **Acts authorized.** The representatives are authorized to receive and inspect confidential tax information and to perform any and all acts that I (we) can perform with respect to the tax matters described on line 3, for example, the authority to sign any agreements, consents, or other documents. The authority does not include the power to receive refund checks (see line 6 below), the power to substitute another representative unless specifically added below, or the power to sign certain returns (see instruction for Line 5—Acts authorized).

List any specific additions or deletions to the acts otherwise authorized in this power of attorney:

Note: *In general, an unenrolled preparer of tax returns cannot sign any document for a taxpayer. See Revenue Procedure 81-38, printed as Pub. 470, for more information.*

Note: *The tax matters partner of a partnership is not permitted to authorize representatives to perform certain acts. See the instructions for more information.*

6 **Receipt of refund checks.** If you want to authorize a representative named on line 2 to receive, BUT NOT TO ENDORSE OR CASH, refund checks, initial here _____ and list the name of that representative below.

Name of representative to receive refund check(s) ▶

7 **Notices and communications.** Original notices and other written communications will be sent to you and a copy to the first representative listed on line 2 unless you check one or more of the boxes below.

a If you want the first representative listed on line 2 to receive the original, and yourself a copy, of such notices or communications, check this box . . . . . ▶ ☒

b If you also want the second representative listed to receive a copy of such notices and communications, check this box . . . . . ▶ ☐

c If you do not want any notices or communications sent to your representative(s), check this box . . . . . ▶ ☐

8 **Retention/revocation of prior power(s) of attorney.** The filing of this power of attorney automatically revokes all earlier power(s) of attorney on file with the Internal Revenue Service for the same tax matters and years or periods covered by this document. If you do not want to revoke a prior power of attorney, check here. . . . . ▶ ☐
YOU MUST ATTACH A COPY OF ANY POWER OF ATTORNEY YOU WANT TO REMAIN IN EFFECT.

9 **Signature of taxpayer(s).** If a tax matter concerns a joint return, **both** husband and wife must sign if joint representation is requested, otherwise, see the instructions. If signed by a corporate officer, partner, guardian, tax matters partner, executor, receiver, administrator, or trustee on behalf of the taxpayer, I certify that I have the authority to execute this form on behalf of the taxpayer.

▶ **IF NOT SIGNED AND DATED, THIS POWER OF ATTORNEY WILL BE RETURNED.**

E C Term of Years Trust

By: [signature]	7-17-01	Trustee
Signature	Date	Title (if applicable)

John S. Cullers, Trustee
Print Name

Signature	Date	Title (if applicable)

Print Name

Part II Declaration of Representative

Under penalties of perjury, I declare that:

- I am not currently under suspension or disbarment from practice before the Internal Revenue Service;
- I am aware of regulations contained in Treasury Department Circular No. 230 (31 CFR, Part 10), as amended, concerning the practice of attorneys, certified public accountants, enrolled agents, enrolled actuaries, and others;
- I am authorized to represent the taxpayer(s) identified in Part I for the tax matter(s) specified there; and
- I am one of the following:
  - a Attorney—a member in good standing of the bar of the highest court of the jurisdiction shown below.
  - b Certified Public Accountant—duly qualified to practice as a certified public accountant in the jurisdiction shown below.
  - c Enrolled Agent—enrolled as an agent under the requirements of Treasury Department Circular No. 230.
  - d Officer—a bona fide officer of the taxpayer's organization.
  - e Full-Time Employee—a full-time employee of the taxpayer.
  - f Family Member—a member of the taxpayer's immediate family (i.e., spouse, parent, child, brother, or sister).
  - g Enrolled Actuary—enrolled as an actuary by the Joint Board for the Enrollment of Actuaries under 29 U.S.C. 1242 (the authority to practice before the Service is limited by section 10.3(d)(1) of Treasury Department Circular No. 230).
  - h Unenrolled Return Preparer—an unenrolled return preparer under section 10.7(c)(viii) of Treasury Department Circular No. 230.

▶ **IF THIS DECLARATION OF REPRESENTATIVE IS NOT SIGNED AND DATED, THE POWER OF ATTORNEY WILL BE RETURNED.**

Designation—Insert above letter (a–h)	Jurisdiction (state) or Enrollment Card No.	Signature	Date
a	TEXAS 00949000	[signature]	7/17/01

Supreme Court, U.S.
FILED
DEC 11 2006
OFFICE OF THE CLERK

No. 05-1541

IN THE

Supreme Court of the United States

EC TERM OF YEARS TRUST,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

FRANCIS S. AINSA, JR.
AINSA HUTSON, L.L.P.
ATTORNEYS AT LAW
5809 Acacia Circle
El Paso, TX 79912
(915) 845-5300

Attorneys for Petitioner

205326

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

The following question is presented:

Whether a party who would have been entitled to commence a timely action under 26 U.S.C. § 7426 to challenge an allegedly wrongful Internal Revenue Service levy upon its property to collect taxes owed by another, but failed to commence such an action within the applicable limitations period, may seek a refund of the amount collected by the levy through a tax-refund action under 28 U.S.C. § 1346(a)(1).

LIST OF PARTIES

All parties to this action are fully and correctly listed in the caption.

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Legislative History

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Sen. Rep. No. 89-1708 (1966), *as reprinted in* 1966 U.S.C.C.A.N. 3722 ..... 18, 19

Secondary Authority

Ferguson, *Jurisdictional Problems in Federal Tax Controversies*, 48 Iowa L. Rev. 312 (1963) 7

Plumb, *Federal Tax Collection and Lien Problems, Part II*, 13 Tax Law Rev. 459 (1958) 18

This case presents a question of whether Congress intended that 26 U.S.C. § 7426 be the sole and exclusive remedy available to a third party whose property has been seized under a levy to satisfy taxes due by other taxpayers or whether Congress intended that the refund statute, 28 U.S.C. § 1346 continue to be available to a third party regardless of whether the third party failed to file a timely claim under 26 U.S.C. § 7426. Congressional intent evidenced by the language of 26 U.S.C. § 7426 indicates that this statute did not preempt 28 U.S.C. § 1346 and did not become an exclusive remedy. Congressional intent as evidenced by reference to legislative history also indicates that Congress did not intend for 26 U.S.C. § 7426 to be the sole and exclusive remedy for a wrongful levy. Further, reasonable inferences drawn from the structure of 26 U.S.C. § 7426 do not support the conclusion that it was intended by Congress to be a sole and exclusive remedy for a wrongful levy. The Fifth Circuit erroneously concluded that Congress intended that 26 U.S.C § 7426 be the sole and exclusive remedy from the legislative history due to the fact that 26 U.S.C. § 7426 had a shorter statute of limitations than 28 U.S.C. § 1346. This Court should reverse the Fifth Circuit's judgment and hold that 28 U.S.C. § 1346 is available to a third party whose property has been seized through a wrongful levy even if the third party had an opportunity to utilize 26 U.S.C. § 7426.

OPINIONS AND ORDERS

The Fifth Circuit affirmed the November 22, 2004, decision of the United States District Court for the Western District of Texas - El Paso Division, reported at 2004 WL 911307 (not reported in the Federal Supplement). The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *E.C. Term of Years Trust v. United States*, 434 F.3d 807 (2006).

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1). The District Court's order was entered on November 22, 2004. The Fifth Circuit's opinion was rendered on January 3, 2006. A petition for a panel rehearing was denied on March 2, 2006.

STATUTORY PROVISIONS INVOLVED

Title 26 United States Code, Section 7426.

(a) Action permitted

(1) Wrongful levy. If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may brig a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary.

Title 28 United States Code, Section 1346.

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Courts [United States Court of Federal Claims], of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax

> alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws[.]

STATEMENT OF THE CASE

In 1991, Elmer W. Cullers, Jr. and Dorothy Cullers created the EC Term of Years Trust to reduce the impact of federal estate taxes on their estates. In 1993, the Internal Revenue Service assessed additional federal income taxes, penalties and interest against Elmer W. Cullers, Jr. and Dorothy Cullers for tax years 1981 through 1984. In 1999, claiming that the Cullers had transferred property to the EC Term of Years Trust to avoid paying federal income taxes, the Internal Revenue Service filed transferee tax liens against the EC Term of Years Trust for the tax liability owed by the Cullers

In 1999, the Internal Revenue Service threatened to take legal action against the EC Term of Years Trust to seize and sell its property to satisfy the tax obligations of the Cullers. To avoid the sale of its property, in 1999 the EC Term of Years Trust deposited the total amount of taxes, penalties and interest due by Elmer W. Cullers, Jr. and Dorothy Cullers in a bank account and notified the Internal Revenue Service so that it could levy on the account. On September 10, 1999, the IRS levied on the bank account established by EC Term of Years Trust, which contained $3,389,426.37, and seized all funds therein to satisfy the tax liabilities owed by the Cullers. (Joint Appendix, paragraph 8 of Exhibit B attached to Exhibit D)

In September 2000, EC Term of Years Trust and other entities filed a complaint for a wrongful levy under 26 U.S.C. § 7426; however, the complaint was filed more than nine months after the levy. On December 28, 2000, the District Court dismissed the complaint for wrongful levy for lack of subject matter jurisdiction because it had been filed more than nine months after the levy and was time barred under 26 U.S.C. § 7426.

On September 6, 2001, EC Term of Years Trust filed an administrative claim for a refund for the amount seized by the Internal Revenue Service under the levy. After the claim for a refund was denied, on September 6, 2001, EC Term of Years Trust filed a complaint for a refund of the $3,389,426.37 in the United States District Court for the Western District of Texas - El Paso Division under 28 U.S.C. § 1346. On November 22, 2004, the District Court held that Petitioner's sole remedy was under 26 U.S.C. § 7426 and dismissed Petitioner's Complaint for lack of subject matter jurisdiction.

Petitioner appealed the case to the Fifth Circuit in reliance on this Court's holding in *United States v. Williams*, 514 U.S. 527 (1995) and the Ninth Circuit Court of Appeal's holding in *WWSM Investors v. United States*, 64 F.3d 456 (9th. Cir. 1995). The Fifth Circuit held that the wrongful levy procedure under 26 U.S.C. § 7426 is the exclusive remedy for a wrongful levy and affirmed the dismissal of EC Term of Years Trust's Complaint for lack of subject matter jurisdiction.

SUMMARY OF THE ARGUMENT

Whether 26 U.S.C. § 7426 is the exclusive remedy available to a third party whose property has been seized under a levy the Internal Revenue Service involves a determination of congressional intent. 26 U.S.C. § 7426 does not contain a provision that it is the sole and exclusive remedy of a third party such as EC Term of Years Trust whose property has been seized by a wrongful levy. Other provisions of the Internal Revenue Code have been made expressly exclusive when Congress so intended. Congressional intent to make 26 U.S.C. § 7426 exclusive cannot be shown through a review of the Senate and House Reports that were published shortly before 26 U.S.C. § 7426 was enacted as part of the Federal Tax Lien Act of 1966. Congressional intent also cannot be inferred from the structure of 26 U.S.C. § 7426 because it does not evidence that Congress was creating a comprehensive scheme to deal with a situation that was previously not subject to judicial action. The Senate and House committee reports clearly show that third parties whose property had been seized by the Internal Revenue Service had judicial remedies and that the purpose of 26 U.S.C. § 7426 was merely to clarify and codify those remedies. The argument that Congress must have intended for 26 U.S.C. § 7426 to be exclusive simply because it contains a shorter statute of limitations than 28 U.S.C. § 1346 completely ignores the accepted methods of determining Congressional intent and was rejected by this Court in *United States v. Williams*, 514 U.S. 527 (1995). The rationale used by the Fifth Circuit Court of Appeals in fashioning its holding in conformity with the holding of *United Sand & Gravel v. United States*, 624 F.2d 733 (5th Cir. 1980), does not correctly apply the rules of determining congressional intent and has now been undercut by the holding in *Williams*. There is no

basis to confine the holding in *Williams* to its facts because to do so would constitute legislating tax policy, which is the exclusive domain of Congress.

ARGUMENT

The issue to be decided is whether the EC Term of Years Trust, which paid taxes assessed against Elmer W. Cullers, Jr. and Dorothy Cullers under a levy on a bank account that was created to avoid a threatened sale of property by the Internal Revenue Service, may utilize the refund provisions of 28 U.S.C. § 1346, even though it had an opportunity file a complaint for a wrongful levy under 26 U.S.C. § 7426.

This issue can be decided only by determining whether Congress intended 26 U.S.C. § 7426 to preempt the pre-existing refund provision in 28 U.S.C. § 1346 and thus become the exclusive remedy available to a third party whose property was seized under an allegedly wrongful levy, or whether Congress intended the two statutes to co-exist as alternative remedies.

28 U.S.C. § 1346 and 26 U.S.C. § 7426 of the Internal Revenue Code constitute a grant of jurisdiction and a waiver of sovereign immunity. Both statutes authorize suits against the United States to recover property taken in connection with the collection of taxes.

A. Pre-26 U.S.C. § 7426 Practice

28 U.S.C. § 1346 was enacted in 1948. 26 U.S.C. § 7426 was enacted in 1966. In the pre-26 U.S.C. § 7426 era, federal courts permitted third parties to restrain wrongful levies; *Raffaele v. Granger*, 196 F.2d 620 (3d Cir. 1952); *Tomlinson*

v. Smith, 128 F.2d 808 (7th Cir. 1942); *Rothensies v. Ullman*, 110 F.2d 590 (3d Cir. 1940); and to obtain declaratory judgments on rights to property; *Bullock v. Latham*, 306 F.2d 45 (2d Cir. 1962). Federal courts also permitted third parties to recover money wrongfully taken even if deposited with the Treasury Department. *Stuart v. Chinese Chamber of Commerce*, 168 F.2d 709 (9th Cir. 1948); *Karno-Smith Co. v. Maloney*, 112 F.2d 690 (3d Cir. 1940); *Szerlip v. Marcelle*, 136 F. Supp. 862 (D.C. N.Y. 1955); *Colorado Milling & Elevator Co. v. Glenn*, 118 F. Supp. 943 (D.C. Ky, 1954). During this period, the Government often contended that third parties seeking a return of funds from the IRS were subject to the refund procedure in the Internal Revenue Code. *United States v. Worley*, 213 F.2d 509 (6th Cir. 1954). In the years before the enactment of 26 U.S.C. 7426, actions of assumpsit for money had and received were brought against the tax collector personally rather than the United States. Ferguson, *Jurisdictional Problems in Federal Tax Controversies*, 48 Iowa L. Rev. 312, 327 (1963).

B. The Primary Post-26 U.S.C. § 7426 Cases

The first Fifth Circuit decision on the exclusivity of 26 U.S.C. § 7426 was *United Sand & Gravel Contractors, Inc. v. United States*, 624 F.2d 733 (5th Cir. 1980). In this case a subcontractor claimed an interest in funds due to the general contractor that had been seized by the Internal Revenue Service to satisfy the general contractor's tax liability. The subcontractor sued under the Quiet Title Act (28 U.S.C. 2410) more than nine months after the Internal Revenue Service had seized the funds under a levy. The Fifth Circuit held that 26 U.S.C. § 7426 was the exclusive remedy by relying on the reasoning in *United States v. A.S. Kreider Co.*, 313 U.S. 443 (1941). In *Krieder*, the taxpayer had filed

suit to recover taxes within the six year limitations period under the predecessor of 28 U.S.C. § 2401 but not within the time period set forth in the Revenue Act of 1926. The Court held that, since the six-year statute was phrased in the negative, Congress was free to shorten the period of limitations by specific legislation for a certain class of claims. *Kreider*, 313 U.S. at 447. The Court stated that to not give effect to the shorter period would render the subsequent statute meaningless. *Id.* at 448.

The Fifth Circuit noted that 28 U.S.C. § 2401 was also worded in the negative and, following the rationale of *Kreider*, held that this fact evidenced an intent on the part of Congress for 26 U.S.C. § 7426 to be the exclusive remedy. *United Sand & Gravel*, 624 F.2d at 738. The court also concluded that any different conclusion would undercut the shorter period of limitations in 26 U.S.C. § 7426. *Id.* In buttressing its holding in *United Sand & Gravel*, the Fifth Circuit also referred to the Senate committee report that contained a statement that the United States could not be sued by a third party whose property was seized to satisfy the tax liability of another person. *United Sand & Gravel*, 624 F.2d at 739. In this regard, the Fifth Circuit's reasoning appears to be based on the conclusion that since, prior to 26 U.S.C. § 7426, the United States could not be sued directly by a third party whose property had been seized, 26 U.S.C. § 7426 had to be the exclusive remedy. The Fifth Circuit even stated that the United States need not provide parties such as United Sand with alternative remedies. *Id.* at p. 739. In *United Sand & Gravel*, the Fifth Circuit found Congressional intent based on its conclusion that to hold otherwise would render the nine month statute of limitations to be meaningless. *Id.*

The exclusivity analysis used by the Fifth Circuit in *United Sand & Gravel* was not followed by the Court of Claims in *Gordon v. United States*, 649 F.2d 837 (1981), which involved a case under the Tucker Act. In *Gordon*, the issue was whether Congress withdrew Tucker Act jurisdiction from the Court of Claims when the Tax Lien Act of 1966, which included 26 U.S.C. § 7426, was enacted. Prior to 26 U.S.C. § 7426 , third parties brought levy actions in the Court of Claims under an implied contract theory. *Kirkendall v. United States*, 31 F. Supp. 766 (Cl. Ct. 1940). The Government argued that the 26 U.S.C. § 7426 provided the exclusive remedy for third party levy actions and that after the passage of 26 U.S.C. § 7426, third party levy actions could no longer be brought in the Court of Claims. The Court of Claims noted that when Congress passed 26 U.S.C. § 7426, it did not grant the district courts exclusive jurisdiction over third party levy contests and that the statute did not contain mandatory language as might be expected if Congress intended for its provisions to be exclusive. *Gordon*, 649 F.2d at 839. The Government argued that the Court of Claims should infer that Congress intended that 26 U.S.C § 7426 be exclusive because Congress was unaware that the Court of Claims was handling third party levy contests under the Tucker Act. *Gordon*, 649 F.2d at 840. The Court of Claims disposed of this argument by making reference to the Final Report of the American Bar Association's Committee on Federal Tax Liens. This report was included in the legislative history of the Tax Lien Act. The Court of Claims noted that the ABA report contained a statement indicating that "while decisional law generally allowed third parties to contest levies in the district courts, there was some uncertainty whether the district courts had jurisdiction to grant injunctive and declaratory relief if the nominal defendant was the United States rather than the tax collector." *Gordon*, 649 F.2d at 840.

The Court of Claims also noted that the ABA report also made reference to the right of third parties to seek relief under the Tucker Act in the Court of Claims. *Id.* at 840- 841. After its review of the legislative history of 26 U.S.C. § 7426, the Court of Claims concluded that Congress well understood that the Court of Claims was handling third party levy claims before the enactment of 26 U.S.C. § 7426, and that the focus of the new section was to clarify uncertainties in the relief that a district court might provide. *Gordon*, 649 F.2d at 841. The Court of Claims also examined and rejected the argument by the Government that exclusivity should be inferred from the structure of 26 U.S.C. § 7426. *Id.* at 842. In the end, the Court of Claims held that 26 U.S.C. § 7426 did not deprive it of exercising Tucker Act jurisdiction.

In *United States v. Williams*, 514 U.S. 527 (1995), the issue was whether Ms. Williams, who, under duress, paid taxes assessed against her former husband in order to remove a tax lien on her property, could pursue a tax refund under 28 U.S.C. § 1346. The Government first argued that the provisions of 28 U.S.C. § 1346 must be read *in para material* with 26 U.S.C. § 6511, which requires that a taxpayer file a refund claim, and 26 U.S.C. § 7701, which defines a taxpayer as a person subject to the tax. The Government posited that, since Ms. Williams did not fall within the definition of a taxpayer, she did not have standing to bring a refund action under 28 U.S.C. § 1346. The second argument was that, if third party refund suits under 28 U.S.C. § 1346 were allowed, 26 U.S.C. § 7426 would be rendered superfluous. This argument was premised on the notion that, prior to the enactment of 26 U.S.C. § 7426, third parties did not have the right to sue the Government and that Congress would not have needed to provide for third party remedies if refund suits had been allowed under prior law. The third argument

was that Ms. Williams had other forms of relief available to her such as a suit to quiet title under 28 U.S.C. § 2410. Finally, the Government argued that, if third party refund suits were allowed, collection efforts against the taxpayer against whom the assessment had been made would be frustrated.

This Court disposed of each of these arguments in holding for Ms. Williams. On the issue of whether Ms. Williams was a taxpayer, this Court noted that, even if 28 U.S.C. § 1346 has to be read *in para material* with other provisions of the Code, the definition of a taxpayer is broad enough to include third persons who actually paid the taxes. *Williams*, 514 U.S. at 536. Further, 28 U.S.C. § 1346 by its own terms does not limit refund jurisdiction to assessed taxpayers. *Id.* at 536. This Court also noted that 26 U.S.C. § 7426 simply represented a codification of the existing common law action that third parties had historically brought against the tax collector to recover money erroneously collected. *Id.* at 531. This Court also noted that, since no levy had been served on Ms. Williams, Section 7426 was not available to her in any event. *Id.* at 536. Finally, this Court rejected the very rationale used in *United Sand & Gravel* by refusing to agree with the Government's argument that the use of 28 U.S.C. § 1346 would render superfluous other actions such as wrongful levy. *Id.* at 540.

The Court also noted that 28 U.S.C. § 1346 is a post-deprivation remedy and is available only when the third party has paid the government in full. Conversely, a wrongful levy action offers pre-deprivation relief and is available even if the property in question has not been surrendered. *Williams*, 514 U.S. at 540. The holding in *United States v. Williams* at least stands for the proposition that the reach of 28 U.S.C. § 1346 is broad enough to include a third party who pays the

tax of another party under duress and does not have another remedy. By framing the holding in *Williams* in terms of Congressional intent, the case must also stand for the proposition that Congress did not generally intend for 28 U.S.C. § 1346 to be unavailable to third parties.

While this Court noted that Ms. Williams could not have brought a wrongful levy action or a quiet title action or substitute a fund for the Government's lien, this was not the basis for the holding. This Court noted that the refund procedure was even more compelling in this case because Ms. Williams could sell the property, pay off the lien and then seek a refund from the Government. *Williams* at p 536. Interestingly, neither the federal courts nor the Internal Revenue Service appear to have ever taken the position that an assessed taxpayer is precluded from pursuing a refund simply because the overpayment arose through a levy. Arguing that a different set of rules applies to third parties who pay is tantamount to arguing that the distinction between assessed taxpayers and third party taxpayers struck down by *Williams* is still alive and well.

In *Williams*, this Court put to rest this issue of whether a third person who pays the tax of another person is a taxpayer and has standing to bring a refund action. This Court noted that the Government had acknowledged the "evident breadth of 28 U.S.C § 1346 (a) (1) . . ." even though it was making other arguments to limit its effect. *Williams*, 514 U.S. at 531. *Williams* also put to rest the argument that if a third party such as Ms. Williams was able to utilize 28 U.S.C. § 1346, it would render other remedies to be meaningless.

The issue of exclusivity of 26 U.S.C. § 7426 was the focal point of *WWSM Investors v. United States*, 64 F.3d 456

(9th Cir. 1995). *WWSM* involved a levy of a bank account, as opposed to a payment of a tax lien as was the case in *Williams*. WWSM Investors filed its complaint under 26 U.S.C. § 7426 more than nine months following the levy. The district court denied WWSM Investors leave to amend its complaint to set forth a claim for a refund under 28 U.S.C. § 1346. The district court then dismissed the case on the ground that 26 U.S.C. § 7426 was the exclusive remedy and that it lacked subject matter jurisdiction because the claim was time-barred.

The Ninth Circuit Court of Appeals reversed the case and held that WWSM Investors had a separate cause of action for a refund under 28 U.S.C. § 1346. In concluding that 28 U.S.C. § 1346 is also available to a taxpayer who had an opportunity to utilize 26 U.S.C. § 7426, the Ninth Circuit relied upon this Court's holding in *Williams* regarding the breadth of 28 U.S.C. § 1346. *WWSM* at 459. The Ninth Circuit rejected the Government's attempt to create a distinction between a tax lien (*Williams*) and a levy (*WWSM*). The Ninth Circuit concluded that a tax lien and a levy were functionally equivalent. The Ninth Circuit was also not persuaded that the holding in *Williams* was limited to fact situations where the taxpayer bringing a refund action under 28 U.S.C. § 1346 could not have filed a wrongful levy action under 26 U.S.C. § 7426. In essence, the Ninth Circuit in *WWSM* held that 26 U.S.C. § 7426 was not the exclusive remedy available to a third party who paid the taxes of another assessed taxpayer, even though such taxpayer had an opportunity to file a complaint for a wrongful levy under 26 U.S.C. § 7426. The Ninth Circuit's holding in *WWSM* also stands for the proposition that Congress did not intend for 26 U.S.C. § 7426 to be the exclusive remedy in a wrongful levy context.

The Ninth Circuit Court of Appeals also spoke on the exclusivity issue in *Fidelity & Deposit Co. of Maryland v. City of Adelanto*, 87 F.3d 334 (9th Cir. 1996). This case involved a notice of levy served on the city for money owed to a third party. Fidelity & Deposit Co. contested the levy but not through the use of 26 U.S.C. § 7426. The district court dismissed the case partially on the grounds that the 26 U.S.C. § 7426 was the exclusive remedy and that, based on the facts, such an action was time-barred. In its opinion, the Ninth Circuit stated: "Thus, to the extent that a refund action is available, Section § 7426 is not the exclusive remedy for a wrongful levy and to this extent, *Winebrenner* has been overruled by *Williams*." *Fidelity & Deposit Co.*, 87 F.3d at 338.

In *Dahn v. United States*, 127 F.3d 1249 (10thCir. 1997), the Tenth Circuit Court of Appeals also dealt with the exclusivity issue involved with 26 U.S.C. § 7426 litigation. This case involved a seizure by the Internal Revenue Service of property owned by the Dahns to satisfy a tax liability of their parents. In holding that 26 U.S.C. § 7426 was the exclusive remedy in wrongful levy cases, the Tenth Circuit approved its holding in *United Sand & Gravel* and declined to follow the holding in *WWSM*. The Tenth Circuit also stated that *Williams* was not controlling because it dealt with the payment of a tax lien and not a levy and involved a person who did not have the opportunity to use 26 U.S.C. § 7426. The Tenth Circuit held that with respect to *United States v. Williams*, "There is no indication that the Court intended to reach beyond the confines of the case before it and overturn, sub silencio, the separate and well established principle that Sec. 7426 provides the exclusive remedy for a wrongful levy." *Dahn*, 127 F.3d at 1253.

C. The Disposition by the United States District Court

The district court, in its Order, conceded that this Court's holding in *Williams* rejected the law of the Fifth Circuit (District Court's Order, p. 4)[1] and stated the holding in *Williams* would have required a different result in *Snodgrass v. United States*, 834 F.2d 537 (5th Cir. 1987) on the issue of standing. However, the district court chose to dismiss Petitioner's complaint for a refund by concluding that the holding in *Williams* ". . . establishes an equitable exception for those who cannot otherwise avail themselves of pre - deprivation remedies." District Court's Order, p. 7. Essentially, the district court limited the holding of *Williams* to its facts.

D. The Disposition by the Fifth Circuit Court of Appeals

In *EC Term of Years Trust v. United States*, 434 F.3d 807 (2006), the Fifth Circuit followed the rationale set forth in *United Sand & Gravel*. The Court held that when 26 U.S.C. § 7426 is available to an individual, it is his sole and exclusive remedy. *EC Term of Years Trust* 434 F.3d at 810. The Fifth Circuit concluded that the holding in *Williams* regarding the reach of 28 U.S.C. § 1346 was limited to the situation where a remedy under 26 U.S.C. § 7426 is unavailable. *EC Term of Years Trust*, 434 F.3d at 810. The Fifth Circuit declined to follow the holding in *WWSM* that 28 U.S.C. § 1346 and 26 U.S.C. § 7426 generally coexist and are available to third parties as alternative remedies. Such a result would

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1. References to The Order of the United States District Court for the Western District of Texas, El Paso Division, in *EC Term of Years Trust v. United States*; Cause No. EP-03-CA-363(KC) (included in Appendix B of Petitioner's Appendix to the Petition for Writ of Certiorari) shall be cited herein to "District Court's Order."

"undermine the surety provided by the clear avenue to recovery under 7426." *EC Term of Years Trust* 434 F 3d at 810. The Fifth Circuit affirmed the District Court's dismissal of EC Term of Years Trust's Complaint for lack of subject matter jurisdiction.

E. Congressional Intent

26 U.S.C. § 7246 was added to the Internal Revenue Code by the Federal Tax Lien Act of 1966. A claim under 26 U.S.C. § 7426 must be brought not later than nine months after the date of the levy unless the third party sends a letter to the district director requesting a return of the property, in which event the time period is extended for an additional 12 months from the date of filing such a request. 26 U.S.C. § 6532(c)(2) (2000).

28 U.S.C. § 1346 was enacted in 1949. An action for a refund of taxes under 28 U.S.C. § 1346(a)(1) may be brought up to two years after the Internal Revenue Service disallows an administrative claim for refund. A claim for a refund may be filed up to two years after the tax is paid or up to three years after the taxpayer files a tax return with respect to the tax.. 28 U.S.C. § § 6511(a) (2000), 6532(a)(1) (2000).

Whether a statutory remedy is exclusive is a question of congressional intent. *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701 (1989). Legislative intent is sometimes manifest in the language of the statute itself. For example, 26 U.S.C. § 7433(a) provides that its remedy for reckless or intentional Internal Revenue Service collection activity is exclusive. So also, 26 U.S.C. § 7435 provides that its remedy for unauthorized disclosure of tax information is exclusive.

26 U.S.C. § 7426 does not expressly state that its remedial provisions are exclusive or that it preempts the refund procedures set forth in 28 U.S.C. § 1346. This omission is of prime importance because, if Congress intended for 26 U.S.C. § 7426 to preempt 28 U.S.C. § 1346 and become the exclusive remedy, it could have easily provided for that result in the statute itself. This omission was duly noted in *Gordon* at 839 and 840.

An analysis of the language of 26 U.S.C. § 7426 (a) (1) also strongly suggests that Congress did not intend for it to preempt 28 U.S.C. § 1346:

> (1) Wrongful levy. If a levy has been made on property ... any person ... who claims ... that such property was wrongfully levied upon *may* (italics added) bring a civil action against the United States in a district court of the United States. Such action *may* (italics added) be brought without regard to whether such property has been surrendered to or sold by the Secretary.

If Congress intended for 26 U.S.C. § 7426 to preempt 28 U.S.C. § 1346, it surely would have used "shall" instead of "may" in order to indicate that its intent was that 26 U.S.C. § 7426 was to become the only remedy.

In the absence of any language in the statute, congressional intent can sometimes be ascertained by reference to the legislative history. In the case of 26 U.S.C. § 7426, the House and Senate committee reports indicate that the primary concern at the time was that third parties were not able to sue the Government directly when its collection efforts interfered with their property rights. The

House and Senate committee reports make it clear that at the time the Tax Lien Act was being debated, Congress was aware of the fact that third parties whose property rights were affected by collection efforts of the Internal Revenue Service had been filing suits against the collector or a district director.[2] *See generally*, Plumb, *Federal Tax Collection and Lien Problems, Part II*, 13 Tax Law Rev. 459 (1958). These cases were not technically suits against the Government but were treated as such in that the Government defended them and paid the costs. The House and Senate committee reports make it clear that Congress was clarifying that third parties could proceed directly against the Government in district court for a wrongful levy.[3] On the other hand, the House and

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2. Under present law, for example, the United States cannot be sued by third persons where its collection activities interfere with their property rights. This includes cases where the Government wrongfully levies on one person's property in attempting to collect from a taxpayer. However, some courts allow suits to be brought against district directors of Internal Revenue where this occurs. Technically, these suits are not against the Government, but, in fact, the Government defends them and pays all costs, so that the effect is practically the same as if these suits were brought against the United States." H.R. Rep. No. 89-1884 at 27 (1966); Sen. Rep. No. 89-1708 (1966), 1966 U.S.C.C.A.N. at 3750.

3. Your committee believes where the Government levies on property which, in part at least, a third person considers to be his, he is entitled to have his case heard in court. While, under present law, some courts in effect permit this result by allowing suits to be brought against district directors, your committee believes this result should be generalized. In addition,

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Senate committee reports cannot be fairly read to indicate that Congress understood that third party remedies were unavailable altogether or that other remedies, such as the refund procedure in 28 U.S.C. § 1346, were being preempted. In this regard, it is of paramount importance that neither the House nor the Senate committee reports state that the wrongful levy provisions in 26 U.S.C. § 7426 were intended to either preempt 28 U.S.C. § 1346 or become the exclusive remedy in the context of an allegedly wrongful levy.

Since neither 26 U.S.C. § 7426 nor the Senate and House committee reports explicitly and directly state that the statute was intended to preempt 28 U.S.C. § 1346 and become the exclusive remedy in a wrongful levy context, the next inquiry must involve an examination of whether the courts can infer congressional intent from the structure of both statutes. This method of ascertaining congressional intent is exemplified by *Brown v. General Services Admin.*, 425 U.S. 820 (1976) in which the Supreme Court held that the remedies available to federal employees under the Civil Rights Act of 1964 were exclusive. The Court drew inferences from the architecture of the statute, which indicated an intent by Congress to

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(Cont'd)

> your committee believes it is more appropriate, instead of bringing the actions against district directors, to bring them directly against the Government . . .
>
> For the reasons given above, your committee's bill permits wrongful levy actions and actions for surplus proceeds to be brought against the Government by nontaxpayers.

H.R. Rep. No. 89-1884 at 28 (1966); Sen. Rep. No. 89-1708 (1966), 1966 U.S.C.C.A.N. at 3750-51.

provide for a comprehensive scheme to deal with employment discrimination at a time when employees had no judicial remedy. In contrast, there is nothing in the structure of 26 U.S.C. § 7426 to indicate that it was intended to be anything other than a clarification that a third party could now sue the Government directly, instead of indirectly in the context of a wrongful levy. That conclusion is amply demonstrated by the Senate and House committee reports.

Preemptive intent cannot be lightly inferred. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976). In this case, the doctrine of implied repeal is discussed. The Court laid down the principle that for one statute to replace another by implication, "It is not enough to show that the two statutes produce differing results when applied to the same factual situation ..." *Radzanower*, 426 U.S. at 155. Evidence of preemptive intent must be clear and manifest. *Blackfeet Indian Tribe v. Mont. Power Co.*, 838 F.2d 1055, 1058 (9th Cir. 1988). "Courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

The argument regarding time and the need to resolve tax issues quickly is also not compelling when examining the time frames involved in the wrongful levy context and the refund context. A wrongful levy claim must be brought within nine months from the date of the levy unless a letter is sent to the district director requesting a return of the property, in which case the time period is extended for an additional twelve months from the date of the request. 26 U.S.C. § 6532(c)(2). An action for a refund of taxes under

28 U.S.C. § 1346(a)(1) may be brought up to two years after the Internal Revenue Service disallows an administrative claim for refund. A claim for a refund may be filed up to two years after the tax is paid. 28 U.S.C. § 6511 (a); 28 U.S.C. § 6532(a)(1). These time frames are not so materially different as to create a compelling basis for the position that the collection of the tax will remain unresolved for a substantial period of time.

There is also no sound basis on which to construct a distinction between a third party, such as EC Term of Years Trust, whose property is taken by a levy in order to keep the Internal Revenue Service from selling its property from a third party who pays a tax lien under duress. In both cases, the third party is suffering economic deprivation of an involuntary nature. In *WWSM*, the Ninth Circuit correctly observed that the lien/levy distinction advocated by the Government is not functionally sound. *WWSM*, 64 F.3d 456 at 459.

As can be seen from the foregoing, the Government's argument in support of the supposed exclusivity of 26 U.S.C. § 7426 cannot be effectively advocated by reference to the language of the statute itself or to its legislative history. Further, inferences cannot be drawn without some evidence of clear congressional intent. At its core, the Government's argument rests on the fact that 26 U.S.C. § 7426 has a nine-month statute of limitation (subject to extension as described above). This feature of the wrongful levy procedure was used in *United Sand & Gravel* to justify the inference that Congress intended for 26 U.S.C. § 7426 to be exclusive. However, that rationale is not supported by the language used in the statute and its legislative history. Congressional intent to make 26 U.S.C. § 7426 preempt the refund statute and be

the sole and exclusive remedy for a wrongful levy cannot be inferred simply by looking at the statute of limitations and concluding that it would be meaningless to hold otherwise. This method of analysis completely ignores the role of congressional intent in statutory construction. Furthermore, the rationale of *United Sand & Gravel* has now been undercut by the holding of *Williams*, which rejected the Government's argument that other remedies would become superfluous if third parties could use 28 U.S.C. § 1346. The argument that Congress must have intended 26 U.S.C. § 7426 to be exclusive simply because it has a shorter statute of limitations than 28 U.S.C. § 1346 completely sidesteps the accepted process of determining Congressional intent.

There is no good reason to contend that 28 U.S.C. § 1346 and 26 U.S.C. § 7426 do not co-exist. 28 U.S.C. § 1346 offers only post-deprivation relief while 26 U.S.C. § 7426 offers pre-deprivation relief. The argument that co-existence would render the shorter time limits of 26 U.S.C. § 7426 to be superfluous was rejected by this Court. *Williams*, 514 U.S. at 540. Further, this argument is really an attempt to circumvent the doctrine of implied repeal. "Courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton*, 417 U.S. at 551.

Notwithstanding the absence of preemptive language in 26 U.S.C. § 7426, the lack of expressed preemptive intent in the legislative history, and the holding in *Williams*, the Government can be expected to argue that, at the very least, the holding in *Williams* should be confined to its facts: i.e. a situation where the third party who paid the tax lien did so

under duress and did not have an effective remedy other than 28 U.S.C. § 1346. This argument inherently involves the proposition that the courts should establish tax policy when it can be shown that making only one remedy available is more efficient from a tax collection standpoint. It may very well be that making one remedy available to a third party whose property has been seized under a levy is more efficient, but that is a decision that should be left to Congress. At this juncture, Congress has not foreclosed the use of both 28 U.S.C. § 1346 and 26 U.S.C. § 7426 by a third party whose property has been seized by the Internal Revenue Service under a levy. Until Congress takes such action, both remedies are available. Any other conclusion places this Court in the position of legislating tax policy.

CONCLUSION

For the reasons stated above, Petitioner respectfully requests that the Supreme Court reverse the decision of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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No. 05-1541

In the Supreme Court of the United States

EC TERM OF YEARS TRUST, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a party who would have been entitled to commence a timely action under 26 U.S.C. 7426 to challenge an allegedly wrongful Internal Revenue Service levy upon its property to collect taxes owed by another, but failed to commence such an action within the applicable limitations period, may seek a refund of the amount collected by the levy through a tax-refund action under 28 U.S.C. 1346(a)(1).

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EC TERM OF YEARS TRUST, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 434 F.3d 807. The opinion of the district court (Pet. App. 8a-18a) is not published in the *Federal Supplement*, but is *available at* 2004 WL 911307.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 2006. A petition for rehearing was denied on March 2, 2006 (Pet. App. 19a). The petition for certiorari was filed on May 31, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is one of several trusts created by Elmer and Dorothy Cullers. In 1999, the Internal Revenue Service (IRS) contended that the Cullers had trans-

ferred property to the trusts to avoid paying their federal income taxes, and the IRS filed tax liens against the trusts for income taxes that the IRS had assessed against the Cullers for tax years 1981 through 1984. Although petitioner and the other trusts disagreed with the IRS's contentions, in August 1999, they opened a bank account for the purpose of satisfying the Cullers's tax deficiency. The IRS then levied on the account, and the bank issued a check on October 5, 1999, to satisfy the levy. Pet. App. 2a; *BSC Term of Years Trust* v. *United States*, No. EP-00-CA-270-H, 2000 WL 33155870, at *2-*3 (W.D. Tex. Dec. 28, 2000).

Almost one year later, on September 7, 2000, petitioner (and others) filed an action against the United States pursuant to 26 U.S.C. 7426, which authorizes an action to challenge a wrongful levy, and 28 U.S.C. 1346(a)(1), which authorizes an action to recover erroneously collected taxes. See Pet. App. 2a, 9a. The district court dismissed the wrongful-levy claim, concluding that it was time-barred because it was not filed within nine months after the challenged levy, as required by 26 U.S.C. 6532(c)(1), and that petitioner had not made a proper request for return of the property that could have extended that nine-month limitation pursuant to the terms of 26 U.S.C. 6532(c)(2). *BSC Term of Years Trust*, 2000 WL 33155870, at *2-*3. In addition, the district court held that it lacked jurisdiction under 28 U.S.C. 1346(a)(1) because 26 U.S.C. 7426 "affords the *exclusive* remedy for an innocent third party whose property is confiscated by the IRS to satisfy another person's tax liability." 2000 WL 33155870, at *2 n.1 (quoting *Texas Commerce Bank Fort Worth, N.A.* v.

United States, 896 F.2d 152, 156 (5th Cir. 1990)); see Pet. App. 3a n.3.[1]

Petitioner and the other trusts voluntarily dismissed their appeal from the district court's decision. See *BSC Term of Years Trust* v. *United States*, No. 01-50127, 2001 WL 722022 (5th Cir. Apr. 25, 2001).

2. On September 6, 2001, petitioner filed an administrative claim for refund of the amount that the IRS had collected by levy. Pet. App. 9a. After the claim was denied, petitioner filed this second action, alleging jurisdiction under 28 U.S.C. 1346(a)(1). Pet. App. 9a.[2] The district court dismissed the complaint on the ground that a wrongful-levy action under 26 U.S.C. 7426 is the "exclusive remedy for those in [petitioner's] circumstances." Pet. App. 17a. The district court rejected petitioner's claim that the decision in *United States* v. *Williams*, 514 U.S. 527 (1995), overruled the "longstanding

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[1] Under 28 U.S.C. 1346(a)(1), an action for a refund of taxes may be brought up to two years after the IRS disallows an administrative claim for refund, which in turn may be filed up to two years after the tax at issue is paid or up to three years after the taxpayer files a tax return with respect to the tax at issue. 26 U.S.C. 6511(a), 6532(a)(1).

[2] The district court denied the government's motion to dismiss the second action on "res judicata" grounds, which the court understood to be an argument based upon claim preclusion rather than issue preclusion. *EC Term of Years Trust* v. *United States*, No. EP-03-CA-363 (KC), 2004 WL 911307, at *2 & n.1 (W.D. Tex. Apr. 23, 2004). The court concluded that the earlier dismissal of petitioner's Section 1346 claim "would not be considered" as a disposition "on the merits for res judicata purposes" and could not receive "more deference than that given a dismissal on subject matter jurisdiction" grounds. *Id.* at *3. Accordingly, the court declined to give preclusive effect to the prior disposition of the Section 1346 claim. The government raised both claim and issue preclusion on appeal (Gov't C.A. Br. 37-44), but the court of appeals did not address either argument. The government does not press either preclusion theory in this Court.

exclusivity rule" with respect to wrongful-levy claims. Pet. App. 17a. In *Williams*, this Court held that a party "who paid a tax under protest to remove a lien on her property, ha[d] standing to bring a refund action under 28 U.S.C. § 1346(a)(1), even though the tax she paid was assessed against a third party," where she had "no realistic alternative to payment of a tax she did not owe" and would otherwise have been left "without a remedy." 514 U.S. at 529. The district court distinguished *Williams* from the facts of this case, where petitioner could have availed itself of the wrongful-levy remedy, but failed to bring a timely claim. Pet. App. 17a. The court declined to read *Williams* as holding that "third-parties, under ordinary circumstances, are no longer required to bring a wrongful levy action as such would create instability in federal government property resolutions inherent in the shortened statute of limitation applicable to such claims." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-7a. The court of appeals noted its prior decisions holding "that if § 7426 is available to an individual, then it is his sole and exclusive remedy," and it observed that the "short statute of limitations governing claims under § 7426 allows for the expeditious resolution of tax liability." *Id.* at 4a. The court concluded that *Williams* should not be read to suggest "that a refund action under § 1346 is available *in addition* to a wrongful levy action under § 7426." *Id.* at 5a. The court further observed that "to allow an alternative remedy under § 1346, with its longer statute of limitations period, *see* 26 U.S.C. §§ 6511(a), 6532(a)(1), would undermine the surety provided by the clear avenue to recovery under § 7426." *Ibid.*

ARGUMENT

The court of appeals correctly held that the wrongful-levy provisions of 26 U.S.C. 7426, as restricted by the applicable statute of limitations (26 U.S.C. 6532(c)), afforded the exclusive remedy available to petitioner to assert its claim, and that petitioner could not circumvent the limitations period applicable to such actions by pursuing a tax-refund suit under 28 U.S.C. 1346(a)(1). The United States agrees with petitioner, however, that this case presents a recurring question of substantial administrative importance on which there is a direct conflict among the courts of appeals. Review by this Court would therefore be appropriate.

1. a. The United States cannot be sued unless Congress has waived the government's sovereign immunity, and such waivers are strictly construed. *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 33, 34, 37 (1992); *United States* v. *Dalm*, 494 U.S. 596, 608 (1990); *Library of Congress* v. *Shaw*, 478 U.S. 310, 318 (1986). Terms and conditions that Congress attaches to the legislative waiver of sovereign immunity are also strictly construed. *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983). "A statute of limitations requiring that a suit against the government be brought within a certain time period is one of those terms." *Dalm*, 494 U.S. at 608; *Block*, 461 U.S. at 287. Moreover, the terms of the government's "consent to be sued in any court define that court's jurisdiction to entertain the suit." *Dalm*, 494 U.S. at 608 (*United States* v. *Testan*, 424 U.S. 392, 399 (1976) (quoting *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941))). Thus, when a party fails to commence a suit against the United States within the limitations period, the government has not waived its sovereign immunity,

and the courts lack jurisdiction to entertain the suit. *Id.* at 608-610. Furthermore, even though Congress has provided one statute of limitations for a general class of actions, it nevertheless can "provide less liberally for particular actions which, because of special considerations, require[] different treatment." *United States* v. *A.S. Kreider Co.*, 313 U.S. 443, 447 (1941) (rejecting taxpayer's reliance in a tax-refund action on a general six-year statute of limitations for suits against the United States).

Congress has done precisely that with respect to wrongful-levy actions under 26 U.S.C. 7426. Section 7426 waives the government's immunity with respect to wrongful-levy actions brought against the United States by "any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property." 26 U.S.C. 7426(a)(1). A wrongful-levy action may be brought "without regard to whether such property has been surrendered to or sold" by the IRS. *Ibid.* Such actions are restricted, however, by Section 6532(c), which provides that "no suit or proceeding under section 7426 shall be begun after the expiration of 9 months from the date of the levy." 26 U.S.C. 6532(c)(1); see 26 U.S.C. 6532(c)(2) (extending that limitation under certain circumstances). Courts have recognized that the enactment of this relatively short limitations period accommodates the need of the government to resolve expeditiously collection issues affecting a taxpayer's account. See, *e.g.*, *United Sand & Gravel Contractors, Inc.* v. *United States*, 624 F.2d 733, 739 (5th Cir. 1980) ("[Section] 6532(c) protects the legitimate interest of the United States in requiring other claimants of the seized property to bring their claims quickly."); *Gordon* v.

United States, 649 F.2d 837, 843 (Ct. Cl. 1981) ("Congress was clearly concerned that levy contests more than 9 months after the levy would prevent ultimate collection of the tax, thereby endangering the federal treasury.").

Given this restriction on wrongful-levy actions, courts have long rejected claims, including refund claims, by property owners who were subject to an IRS levy to collect another's taxes, but who failed to challenge the levy within the limitations period provided by 26 U.S.C. 6532(c). See, *e.g.*, *Miller* v. *Tony & Susan Alamo Found.*, 134 F.3d 910, 916-917 (8th Cir. 1998) (holding that, where Section 7426(a)(1) applies, quiet title actions under 26 U.S.C. 2410 are "foreclosed"); *Dahn* v. *United States*, 127 F.3d 1249, 1253 (10th Cir. 1997) (rejecting "attempt to circumvent the § 7426/ § 6532 time-bar" by invoking other "remedial sources," including Section 1346(a)(1));[3] *Williams* v. *United States*, 947 F.2d 37, 39 (2d Cir. 1991) (holding that the "two-year period set forth in section 6532(a)(1) for a refund of taxes does not apply" and that a wrongful-levy action is the "sole remedy available to an individual * * * who claims an interest in property that has been levied upon by the IRS for the purpose of satisfying the tax liability of another person"), cert. denied, 504 U.S. 942 (1992); *United Sand*, 624 F.2d at 738-739 (rejecting quiet-title claim brought by property owner under 28 U.S.C. 2410 more than nine months after a challenged levy on the ground that his "exclusive remedy" was a wrongful-levy action under Section 7426); see also *Gordon*, 649 F.2d at 843-844 (holding that the

[3] See *Dahn* v. *United States*, No. 93-C-953, 1996 WL 652787, at *4 (D. Utah Aug. 30, 1996) (stating that Dahn invoked 28 U.S.C. 1346(a)(1) and (f)).

statute of limitations for wrongful-levy actions applies to challenges to third-party levy actions brought under the jurisdiction of the Tucker Act, 28 U.S.C. 1491).[4] The decision below is in accord with this substantial line of precedent, and the court of appeals followed its "prior holdings that when § 7426 is available to an individual, then it is his sole and exclusive remedy." Pet. App. 6a-7a.[5]

b. The court of appeals correctly rejected petitioner's contention that this Court's decision in *United States* v. *Williams*, 514 U.S. 527 (1995), altered this

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[4] Petitioner notes (Pet. 7) that *Gordon* was the only decision prior to 1995 in which a court had held that there was an alternative (*i.e.*, an action under the Tucker Act) to a wrongful-levy suit under 26 U.S.C. 7426 for a party to challenge an IRS levy to collect the taxes of another. Significantly, however, the *Gordon* court recognized the importance of the relatively short limitations period applicable to a wrongful-levy suit, and held that a challenge to a levy brought under the Tucker Act must nonetheless be brought within the limitations period governing actions under 26 U.S.C. 7426.

[5] This case illustrates how a challenge to an IRS levy that is brought as a tax-refund suit may impede the tax collection process and disrupt the carefully integrated statutory scheme enacted by Congress. The IRS levied on petitioner's property to collect taxes assessed in 1993 for the 1981 through 1984 tax years. *BSC Term of Years Trust*, 2000 WL 33155870, at *1. The IRS generally may collect a tax by levy or judicial proceeding within ten years after assessment. 26 U.S.C. 6502(a)(1). Under 26 U.S.C. 6503(f)(1), the ten-year collection period is suspended from the date that the IRS seizes property by levy until "the date on which a judgment secured pursuant to section 7426 with respect to such property becomes final, and for 30 days thereafter." But there is no statutory provision that similarly suspends the collection period during the pendency of a tax-refund suit. It is now more than ten years since the assessments were made against the Cullers for the 1981 through 1984 tax years. If petitioner prevails in obtaining a refund of the amounts collected by levy, therefore, it may be too late for the IRS to collect the unpaid taxes from other sources.

longstanding rule. In that case, the Court held that Williams, who had paid under protest a tax that the IRS had assessed against a third party, had standing to bring a refund action under 28 U.S.C. 1346(a)(1). In so holding, the Court noted that none of the remedies that are potentially available to a party when the IRS seizes assets to satisfy the tax liability of another was "realistically open to Williams." 514 U.S. at 536. In particular, the Court observed that she could not have filed a wrongful-levy action under Section 7426, because the collection measure at issue was a tax lien rather than a levy. *Ibid.* Thus, emphasizing that Williams was otherwise "without a remedy," the Court concluded that "Congress did not intend refund actions under § 1346(a)(1) to be unavailable to persons situated as Lori Williams is." *Ibid.*[6]

As the court of appeals here concluded, *Williams* does not "allow litigants who could bring suit under § 7426 *also* to bring suit under § 1346." Pet. App. 5a. Contrary to petitioner's contention (Pet. 10-11), the fact that the *Williams* opinion noted the "evident breadth of § 1346(a)(1)" does not mean that the Court "implicitly determined that 26 U.S.C. § 7426 does not provide the exclusive remedy" to a party, like petitioner, whose situation falls squarely within the scope of Section 7426. As

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[6] In the wake of *Williams*, Congress enacted 26 U.S.C. 6325(b)(4)(A) and 7426(a)(4), which give persons in Williams' situation a remedy apart from a tax-refund suit. Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3106(a) and (b)(1), 112 Stat. 732-733. Section 6325(b)(4)(A) allows a third party whose property is subject to a tax lien to request a certificate of discharge of the lien on his property and provides that the IRS shall issue such a certificate if the property owner provides a deposit or a bond for an amount equal to the government's interest in the property. Section 7426(a)(4) allows suit by the property owner to determine the value of the government's interest in the property if a certificate of discharge is issued.

the Tenth Circuit explained in *Dahn*, the *Williams* Court "was concerned solely with the reach of § 1346 per se; the exclusivity of a concurrent § 7426 claim was never in issue." 127 F.3d at 1253.

Nothing in *Williams* calls into question the long line of authorities recognizing the need for a speedy resolution of property disputes where the IRS levies on a party's property for the collection of another's unpaid taxes. Despite the general language of Section 1346(a)(1), Congress "provid[ed] less liberally" for parties whose property has been subjected to such a levy because of "special considerations, requir[ing] different treatment." *A.S. Kreider Co.*, 313 U.S. at 447; see, *e.g.*, *United Sand*, 624 F.2d at 738. As the court below and the Tenth Circuit have recognized, *Williams* did not "overturn, sub silentio, the separate and well-established principle that § 7426 provides the exclusive remedy for a wrongful levy." *Dahn*, 127 F.3d at 1253; accord Pet. App. 5a-6a.[7]

2. As petitioner notes (Pet. 4-5), the Ninth Circuit's decision in *WWSM Investors* v. *United States*, 64 F.3d 456 (9th Cir. 1995), directly conflicts with the decision in this case. *WWSM Investors* also conflicts with the Tenth Circuit's decision in *Dahn*, 127 F.3d 1249.

In *WWSM Investors*, a third party subject to levy filed an untimely wrongful-levy action, and then moved

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[7] Although petitioner points for support (Pet. 11) to the distinction drawn by *Williams* between pre- and post-deprivation remedies, 514 U.S. at 538, that distinction is of no force in the context of an allegedly wrongful levy because Section 7426 is both a pre- and post-deprivation remedy. The owner of property subject to levy may challenge the levy either before or after the property has been surrendered to (or sold by) the IRS, 26 U.S.C. 7426(a), as long as it does so within the limitations period set forth in 26 U.S.C. 6532(c).

for leave to amend the complaint to include a claim for a tax-refund under 28 U.S.C. 1346(a)(1). Although the Ninth Circuit held that the Section 7426 claim was time-barred, it held that WWSM Investors "may file suit for a refund under 28 U.S.C. § 1346(a)(1)." 64 F.3d at 459. The Ninth Circuit believed that this Court's decision in *Williams* "control[led]" the case because it viewed the levy in *WWSM Investors* as "functionally equivalent" to Williams's payment to discharge the lien in *Williams*. *Ibid.* As the dissent in *WWSM Investors* correctly observed, however, this Court's decision in *Williams* "recognized that Williams could not use the remedy of 26 U.S.C. § 7426 because there was no levy" and "did not allow that a non-levy remedy under § 1346(a)(1) was available when the exclusive levy remedy under § 7426 was barred by the statute of limitations." *Id.* at 459-460 (Brunetti, J., dissenting).

WWSM Investors was decided shortly after this Court's decision in *Williams*.[8] No other court of appeals has followed the Ninth Circuit in reading *Williams* to open federal courts to tax-refund suits by parties who could have brought a timely wrongful-levy action but failed to do so. To the contrary, both the Fifth Circuit in this case and the Tenth Circuit in *Dahn* have noted, but have declined to follow, the Ninth Circuit's approach. Pet. App. 6a; *Dahn*, 127 F.3d at 1253 & n.2. Moreover, apart from refund actions, courts of appeals (including the Ninth Circuit) have continued to reject attempts to circumvent the limitations period on wrongful-levy ac-

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[8] This Court decided *Williams* on April 25, 1995. 514 U.S. 527. The Ninth Circuit issued its initial decision in *WWSM Investors* on May 31, 1995; after the government filed a petition for rehearing, the court replaced its initial opinion with a majority opinion and a dissent on August 22, 1995. See 64 F.3d at 456-457.

tions through the use of other types of claims. See *Audio Invs.* v. *Robertson*, 67 Fed. Appx. 795, 797 (4th Cir. 2003) (per curiam) (rejecting a quiet-title action); *Miller* v. *Tony & Susan Alamo Found.*, 134 F.3d 910, 916 (8th Cir. 1998) (rejecting garnishment action); *Fidelity & Deposit Co.* v. *City of Adelanto*, 87 F.3d 334, 335 (9th Cir. 1996) (rejecting quiet title action).

3. The square conflict that exists among the courts of appeals on the question presented in this case is a recurring one of substantial administrative importance. The issue recurs with sufficient frequency that the IRS has issued a Revenue Ruling to address it. See Rev. Rul. 05-49, 2005-30 I.R.B. 125, 2005 WL 1710988 (July 25, 2005) (stating that the IRS disagrees with *WWSM Investors* and will follow *Dahn*). Because of the conflict among the circuits, parties in the Ninth Circuit are presently permitted to challenge IRS levies through either a wrongful-levy action or a refund action, whereas similarly situated parties in the Fifth and Tenth Circuits are limited to wrongful-levy actions and a shorter limitations period. Review by this Court would be appropriate to ensure consistent application of the revenue laws throughout the country.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 05-1541

In the Supreme Court of the United States

EC TERM OF YEARS TRUST, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a party who would have been entitled to commence a timely action under 26 U.S.C. 7426(a)(1) to challenge an allegedly wrongful Internal Revenue Service levy upon its property to collect taxes owed by another, but failed to commence such an action within the applicable limitation period, may seek a refund of the amount collected by the levy through a tax-refund action under 28 U.S.C. 1346(a)(1).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 434 F.3d 807. The opinion of the district court (Pet. App. 8a-18a) is not published in the *Federal Supplement*. An earlier opinion of the district court (J.A. 11-22) is not published in the *Federal Supplement* but is available at 2004 WL 911307.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 2006. A petition for rehearing was denied on March 2, 2006 (Pet. App. 19a). The petition for certiorari was filed on May 31, 2006, and granted on October 27, 2006. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are set forth in an appendix to this brief. App., *infra*, 1a-15a.

STATEMENT

1. a. If a person liable to pay any tax fails to pay the tax, the Internal Revenue Service (IRS) may collect the tax by levy upon all property or rights to property belonging to that person, including property nominally held by a third party. 26 U.S.C. 6330, 6331. If a third party claims an interest in the levied property, the third party may bring an action for wrongful levy under 26 U.S.C. 7426. Section 7426(a)(1) creates a specific remedy for "any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property" to challenge an allegedly wrongful IRS levy. 26 U.S.C. 7426(a)(1).[1] A wrongful-levy action under Section 7426(a)(1) may be brought "without regard to whether such property has been surrendered to or sold" by the IRS. *Ibid.*

Such actions, however, are subject to the statute of limitations contained in 26 U.S.C. 6532(c). A wrongful-levy action under Section 7426(a)(1) must generally be brought before "the expiration of 9 months from the

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[1] In addition to a wrongful-levy action, Section 7426(a) creates three other types of actions. Two of those actions—to obtain surplus proceeds (see 26 U.S.C. 7426(a)(2)) or substituted sale proceeds (see 26 U.S.C. 7426(a)(3)) after property has been sold pursuant to a levy—were enacted at the same time as the wrongful-levy provisions in Section 7426(a)(1). The fourth type of action, under Section 7426(a)(4), was created in the wake of this Court's decision in *United States* v. *Williams*, 514 U.S. 527 (1995), to provide a specific remedy for certain third parties whose property is subject to an IRS lien. See note 10, *infra*.

date of the levy." 26 U.S.C. 6532(c)(1). If a third party makes a proper administrative request for the return of the levied property, the limitation period is extended for a period no more than 12 months from the date of the request. 26 U.S.C. 6532(c)(2).

b. Section 1346(a)(1) of Title 28 grants district courts jurisdiction, concurrent with the United States Court of Federal Claims, over "[a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected." 28 U.S.C. 1346(a)(1). Such a tax-refund action cannot be brought "until a claim for refund or credit has been duly filed" with the IRS. 26 U.S.C. 7422; *United States* v. *Dalm*, 494 U.S. 596, 601-602 (1990). Section 6511(a) provides that an administrative refund claim must be filed within two years from the date a tax is paid or three years from the time the return was filed, whichever is later. 26 U.S.C. 6511(a). Section 6532(a), in turn, generally requires that any tax-refund action under Section 1346(a) must be filed within two years after the date of the IRS's disallowance of the refund claim, although that period can be extended by agreement. 26 U.S.C. 6532(a)(1) and (2).

2. Petitioner is one of several trusts created by Elmer and Dorothy Cullers. J.A. 29. In 1986, the IRS disallowed loss deductions reported by the Cullers on their income tax returns for the tax years 1981 through 1984 arising out of their investment in MidContinent Drilling Associates, a partnership. J.A. 28. In subsequent litigation, the Tax Court found that the partnership was an abusive tax shelter and disallowed deductions claimed by its partners. *Ibid.*; see *Webb* v. *Commissioner*, 60 T.C.M. (CCH) 1085 (1990); *Midcontinent Drilling Assocs.* v. *Commissioner*, 67 T.C.M. (CCH)

2453 (1994). The IRS then made assessments in 1993 and 1994 of the Cullers's resulting additional income tax liabilities. J.A. 30-33.

In April 1991 and thereafter, the Cullers transferred a substantial portion of their property to petitioner. J.A. 29. In 1999, the IRS filed a tax lien against petitioner for the Cullers's unpaid 1981 through 1984 income taxes, based on the IRS's position that the Cullers had transferred property to petitioner in an effort to avoid paying their federal income taxes. Pet. App. 2a; J.A. 28-32. Although petitioner disagreed with the IRS's contentions, in August 1999, it opened a bank account for the purpose of satisfying the Cullers's unpaid tax liabilities. The IRS then levied on the account, and the bank issued a check for $3,389,426.37 on October 5, 1999, to satisfy the levy. Pet. App. 2a; J.A. 30-34.

Almost one year later, on September 7, 2000, petitioner (and other trusts created by the Cullers) filed an action against the United States pursuant to both 26 U.S.C. 7426(a)(1) and 28 U.S.C. 1346(a)(1). Pet. App. 2a, 9a. The district court dismissed the Section 7426 wrongful-levy claim, concluding that it was time-barred. The court reasoned that the action had not been filed within nine months after the challenged levy, as required by 26 U.S.C. 6532(c)(1), and that petitioner had not made a proper request for return of the property that could have extended the nine-month limitation period pursuant to 26 U.S.C. 6532(c)(2). *BSC Term of Years Trust* v. *United States*, No. EP-00-CA-270-H, 2000 WL 33155870, at *2-*3 (W.D. Tex. Dec. 28, 2000). In addition, the district court held that it lacked jurisdiction under 28 U.S.C. 1346(a)(1) because 26 U.S.C. 7426(a)(1) "affords the *exclusive* remedy for an innocent third party whose property is confiscated by the IRS to satisfy another

person's tax liability." 2000 WL 33155870, at *2 n.1 (quoting *Texas Commerce Bank Fort Worth, N.A.* v. *United States*, 896 F.2d 152, 156 (5th Cir. 1990)); see Pet. App. 3a n.3. Petitioner and the other trusts voluntarily dismissed their appeal from the district court's decision. See *BSC Term of Years Trust* v. *United States*, No. 01-50127, 2001 WL 722022 (5th Cir. Apr. 25, 2001).

3. On September 6, 2001, petitioner filed an administrative claim for refund of the amount that the IRS had collected by levy. Pet. App. 9a; J.A. 27-31. After the claim was denied, petitioner filed this second action, alleging jurisdiction under 28 U.S.C. 1346(a)(1). Pet. App. 9a; J.A. 23-25.[2] The district court dismissed the complaint on the ground that a wrongful-levy action under 26 U.S.C. 7426(a)(1) is the "exclusive remedy for those in [petitioner's] circumstances." Pet. App. 17a. The district court rejected petitioner's claim that the decision in *United States* v. *Williams*, 514 U.S. 527 (1995), overruled the "longstanding exclusivity rule" with respect to wrongful-levy claims. Pet. App. 17a. In *Williams*, this Court held that a party "who paid a tax under protest to remove a lien on her property, ha[d] standing to bring a refund action under 28 U.S.C. § 1346(a)(1), even though the tax she paid was assessed against a third party," where she had "no realistic alternative to payment of a tax she did not owe" and would

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[2] The district court denied (J.A. 11-22) the government's motion to dismiss the second action on "res judicata" grounds. The government raised both claim and issue preclusion on appeal (Gov't C.A. Br. 37-44), but the court of appeals did not address either argument. As noted in the government's response to the petition for a writ of certiorari, see U.S. Cert. Br. 3 n.2, the government does not press either preclusion theory in this Court.

otherwise have been left "without a remedy." 514 U.S. at 529. The district court distinguished *Williams* from the facts of this case, because here petitioner could have availed itself of a wrongful-levy action under 26 U.S.C. 7426(a)(1) but failed to bring a timely claim. Pet. App. 17a. The court declined to read *Williams* as holding that "third-parties, under ordinary circumstances, are no longer required to bring a wrongful levy action as such would create instability in federal government property resolutions inherent in the shortened statute of limitation applicable to such claims." *Ibid.*

4. The court of appeals affirmed. Pet. App. 1a-7a. The court noted its prior decisions holding "that if § 7426 is available to an individual, then it is his sole and exclusive remedy," and it observed that the "short statute of limitations governing claims under § 7426 allows for the expeditious resolution of tax liability." *Id.* at 4a. The court concluded that *Williams* should not be read to suggest "that a refund action under § 1346 is available *in addition* to a wrongful levy action under § 7426." *Id.* at 5a. The court further observed that "to allow an alternative remedy under § 1346, with its longer statute of limitations period, *see* 26 U.S.C. §§ 6511(a), 6532(a)(1), would undermine the surety provided by the clear avenue to recovery under § 7426." *Ibid.*

SUMMARY OF ARGUMENT

The court of appeals correctly held that petitioner cannot seek relief from an allegedly wrongful tax levy through the general tax-refund mechanism authorized by 28 U.S.C. 1346(a)(1) and thereby circumvent the limitation period applicable to wrongful-levy actions under 26 U.S.C. 7426(a)(1). Congress created a specific and carefully drawn remedy under Section 7426(a)(1) pre-

cisely for parties in petitioner's situation, and that provision constitutes the exclusive remedy for third parties whose property is levied upon to collect taxes assessed against another.

This Court has held, in a variety of contexts, that Congress's creation of a specific remedy tailored to a particular set of circumstances will foreclose resort to a more general remedy. That result is clearly appropriate when, as here, the "balance, completeness, and structural integrity" of the specific remedy suggests that it was intended by Congress to be the exclusive avenue of relief. Creation of a shorter statute of limitations for a specific remedy is a powerful indicator that Congress intended that remedy to be exclusive of other potentially available remedies with longer limitation periods. That is particularly true when the provisions at issue authorize suits against the United States, because in those circumstances the shorter limitation period defines the scope of the waiver of the United States' sovereign immunity.

Section 7426(a)(1) is a carefully drawn remedy designed explicitly for parties in petitioner's situation. The "balance, completeness, and structural integrity" of Section 7426 indicate that Congress did not intend that remedy merely to supplement other potential remedies, such as a tax-refund suit. To hold otherwise would permit petitioner to circumvent the terms and limitations of the specific remedy that Congress created precisely for third parties subjected to an IRS levy to collect the taxes of another.

Most significantly, allowing third parties to pursue a tax-refund action in addition to a wrongful-levy action would effectively "render[] nugatory" the shorter limitation period that Congress placed on wrongful-levy ac-

tions, by permitting challenges to levies to be brought well after the expiration of that statutory period. Section 7426 is part of an elaborate and comprehensive tax collection scheme that, among other things, is designed to facilitate expeditious resolution of challenges to IRS tax collection activities and to work in harmony with other, related provisions. Many courts have recognized that the short statute of limitations for wrongful-levy actions by third parties ensures that the IRS will learn promptly whether it needs to continue to pursue collection efforts against the taxpayer. Moreover, Section 7426(a)(1) was enacted by a Congress that, despite the existence of a tax-refund remedy against the United States, perceived no existing remedy directly against the United States for third parties in petitioner's situation, and that considered other potential remedies to be problematic.

The conclusion of the court of appeals here that Section 7426(a)(1) is the exclusive remedy available in petitioner's situation accords with the decisions of other appellate courts, with the sole exception of the Ninth Circuit. Although petitioner asserts that this Court's decision in *United States* v. *Williams*, 514 U.S. 527 (1995), changed this longstanding precedent and created a right for it to seek relief by means of a tax-refund suit, petitioner's reading of that decision is incorrect. *Williams* establishes only the scope of the tax-refund remedy for third parties who have no other statutory remedy; it does not speak to the exclusivity of the specific wrongful-levy action that Congress created precisely for third parties in petitioner's situation.

ARGUMENT

AN ACTION UNDER 26 U.S.C. 7426 IS THE EXCLUSIVE REMEDY AVAILABLE TO A THIRD PARTY WHOSE PROPERTY WAS LEVIED UPON TO SATISFY THE TAX DEBT OF ANOTHER

The court of appeals correctly held that the wrongful-levy provisions of 26 U.S.C. 7426(a)(1), as restricted by the applicable statute of limitations (26 U.S.C. 6532(c)), afforded the exclusive remedy available to petitioner to assert its claim. Having failed to bring a timely claim under Section 7426(a)(1), petitioner cannot circumvent the limitation period applicable to such actions by pursuing a tax-refund suit under 28 U.S.C. 1346(a)(1).

A. The Availability Of A Precisely Drawn, Specific Remedy Precludes Resort To A General Remedy

1. This Court has long recognized and "applied the rule that a precisely drawn, detailed statute pre-empts more general remedies." *Block* v. *North Dakota*, 461 U.S. 273, 285 (1983); see, *e.g.*, *Brown* v. *GSA*, 425 U.S. 820, 834-835 (1976) (citing cases); see also *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113, 121 (2005). In particular, the Court has found that rule to be controlling when the "balance, completeness, and structural integrity" of the specific remedy suggests that it was not merely a supplement to a more general remedy but was intended by Congress to be the exclusive avenue of relief. *Brown*, 425 U.S. at 832. In determining congressional intent in that regard, this Court has looked to the detailed nature of the specific remedy and how it interacts with other provisions. See, *e.g.*, *id.* at 831 (noting that the specific remedy included "complementary administrative and judicial enforcement mechanisms").

As this Court has explained, Congress's creation of a shorter statute of limitations for a specific remedial scheme strongly suggests that Congress intended the remedy to be exclusive of other potentially available remedies with longer limitation periods. See *Block*, 461 U.S. at 285; accord *Abrams*, 544 U.S. at 122-125. That is particularly true when the remedy is against the United States. In that context, the shorter limitation period limits the waiver of the United States' sovereign immunity with respect to the type of action covered by the specific remedy, and it indicates a congressional intent that such actions must be brought expeditiously. See *Block*, 461 U.S. at 283-285. If claimants nevertheless could pursue the general remedy, the shorter statute of limitations "could be avoided, and, contrary to the wish of Congress, an unlimited number of suits involving stale claims might be instituted." *Id.* at 285.

Although a specific statutory remedy may preclude resort to more general remedial statutes even when a broader remedy would otherwise clearly apply, see, *e.g.*, *Preiser* v. *Rodriguez*, 411 U.S. 475, 488-490 (1973), a further consideration that can buttress the exclusivity of a specific remedy is Congress's understanding, at the time it created the remedy, that claimants "had no effective judicial remedy." *Brown*, 425 U.S. at 828. Even if that understanding turns out to be "in some ultimate sense incorrect," the "relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was." *Ibid.* Thus, if Congress believed that it was providing a remedy where none previously existed, or where any potential remedies were "problematic," the inference to be drawn is that the specific remedy is ex-

clusive. *Block*, 461 U.S. at 285; see *Brown*, 425 U.S. at 826-828.

Accordingly, despite the "broad language" of a general remedy and "the literal applicability of its terms," this Court has repeatedly held that a remedy that has been "explicitly * * * designed" for a specific situation "must be understood to be the exclusive remedy available in a situation" where it "clearly applies." *Preiser*, 411 U.S. at 488-490 (holding that, despite the broad language of 42 U.S.C. 1983, a writ of habeas corpus was the "sole federal remedy" for challenges to the fact or duration of a state prisoner's confinement). When Congress enacts a specific remedy subject to particular limitations and requirements, it would frustrate congressional intent to permit litigants to "evade [such] requirement[s] by the simple expedient of putting a different label on their pleadings." *Id.* at 489-490.

2. Applying those principles, the Court in *Block* held that Congress intended the Quiet Title Act, 28 U.S.C. 2409a, "to provide the exclusive means by which adverse claimants could challenge the United States' title to real property." 461 U.S. at 286. In so doing, the Court rejected the availability of a so-called "officer's suit" against the federal officials who oversaw the disputed land. *Id.* at 284-285. The Court placed great weight on the fact that Congress included a twelve-year statute of limitations and other restrictions on its waiver of the United States' sovereign immunity in the Quiet Title Act, restrictions that would be "rendered nugatory" if an officer's suit was an available alternative remedy. *Id.* at 285. The Court also pointed to Congress's understanding that officer's suits were not an available remedy, *id.* at 282, or at least that "it was 'problematic' whether any judicial relief at all was available" before

passage of the Quiet Title Act, *id.* at 285. See also *United States* v. *Mottaz*, 476 U.S. 834, 841-848 (1986) (holding that a Native American could not avoid the statute of limitations applicable to an action under the Quiet Title Act by characterizing her suit as a claim under the General Allotment Act of 1887, 25 U.S.C. 331 *et seq.*, because the Quiet Title Act provided the exclusive remedy).

Similarly, in *Brown*, the Court held that Section 717 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16 (Supp. IV 1974), is the sole remedy available to a federal employee claiming to have been the victim of racial discrimination in the workplace. The Court in *Brown* concluded that, when Congress enacted Section 717, Congress was "persuaded that federal employees who were treated discriminatorily had no effective judicial remedy." 425 U.S. at 828. The Court also relied upon Section 717's "rigorous administrative exhaustion requirements and time limitations," observing that "[i]t would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading." *Id.* at 833. See also, *e.g.*, *Abrams*, 544 U.S. at 127 (holding that the judicial remedy in 47 U.S.C. 332(c)(7) precluded resort to an action under 42 U.S.C. 1983 because enforcement of Section 332(c)(7) through Section 1983 "would distort the scheme of expedited judicial review and limited remedies created" by Section 332(c)(7)); *Great Am. Fed. Sav. & Loan Ass'n* v. *Novotny*, 442 U.S. 366, 375-376, 378 (1979) (holding that "deprivation of a right created by Title VII cannot be the basis for a cause of action" under 42 U.S.C. 1985(3) because otherwise "a complainant could avoid most if not all of these detailed and specific provisions of the law").

The "rule that a precisely drawn, detailed statute pre-empts more general remedies," *Block*, 461 U.S. at 285, is fully applicable in the context of challenges to the government's tax collection efforts. Indeed, given the "carefully articulated and quite complicated structure of tax laws," allowing circumvention of a specific remedy risks "destroying the existing harmony of the tax statutes." *Flora* v. *United States*, 362 U.S. 145, 157-158 (1960).

Thus, in *United States* v. *A.S. Kreider Co.*, 313 U.S. 443 (1941), this Court rejected a taxpayer's attempt to avoid the then-applicable statute of limitations specific to tax-refund actions. See *id.* at 446. Having failed to file a timely tax-refund action in compliance with that provision, the taxpayer sought to rely upon the longer, six-year statute of limitations in the Tucker Act, which applied generally to "suit[s] against the Government," including but not limited to suits "for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected." 28 U.S.C. 41(20) (1940). The Court rejected that attempt, reasoning that the shorter and more specific limitation period for tax-refund actions would have "no meaning" if the general Tucker Act limitation period governed such actions. 313 U.S. at 448. Noting that the six-year limitation was phrased in the negative (*i.e.*, providing that "[n]o suit * * * shall be allowed" unless brought within six years of accrual), the Court held that "nothing in that language precludes the application of a different and shorter period of limitation to an individual class of actions." *Id.* at 447. In so holding, the Court noted the strong federal policy behind the shorter limitation period: Congress "[r]ecogniz[ed] that suits against the

United States for the recovery of taxes impeded effective administration of the revenue laws." *Ibid.*

B. Section 7426(a)(1) Is A Precisely Drawn, Specific Remedy For Wrongful Levy And Is Therefore Exclusive

A straightforward application of the principles set forth in this Court's cases demonstrates that Section 7426(a)(1) is the exclusive remedy for third parties to challenge a wrongful levy. Petitioner could have availed itself of that remedy if it had filed its first suit in a timely fashion. It cannot now circumvent Congress's restrictions on that specific remedial scheme by resorting to a tax-refund suit.

1. Congress provided for expeditious resolution of Section 7426 (a)(1) actions, including a short limitation period

The provisions requiring expeditious resolution of wrongful-levy actions demonstrate Congress's intent to make Section 7426(a)(1) the exclusive remedy for third parties whose property has been subjected to an allegedly wrongful levy to collect the taxes of another.

a. In creating the wrongful-levy remedy in 1966, Congress selected a new, shortened limitation period that applies exclusively to suits under Section 7426. See Federal Tax Lien Act of 1966 (1966 Act), Pub. L. No. 89-719, § 110(a) and (b), 80 Stat. 1142, 1144. Section 6532(c) generally requires that actions under Section 7426(a)(1) must be commenced within "9 months from the date of the levy." 26 U.S.C. 6532(c)(1) (cross-referenced by 26 U.S.C. 7426(i)). That limitation period can be extended if the third party makes a proper request to the IRS for return of the property, but only for (at most) an additional 12 months. 26 U.S.C. 6532(c)(2).

Congress placed the limitation provision for wrongful-levy actions under Section 7426 not in Section 7426 itself, but rather in a new subsection (c) of Section 6532, which already housed the longer statute of limitations applicable to tax-refund suits generally. See 26 U.S.C. 6532(a). Thus, Congress plainly was aware of the longer statute of limitations for tax-refund actions, but intentionally chose to impose a shorter limitation period on wrongful-levy actions by third parties. Further indication that Congress viewed wrongful-levy actions as distinct from tax-refund actions and sought more expeditious resolution for the former is provided by Section 7426(f), which specifies that, unlike tax-refund suits, exhaustion of an administrative refund remedy is not required before bringing an action under Section 7426(a)(1). 26 U.S.C. 7426(f).[3]

b. At the time it enacted Section 7426 and Section 6532(c), Congress also created other provisions that work in harmony with Section 7426 to ensure, among other things, that the IRS's collection efforts are not prejudiced by the pendency of third-party challenges to IRS levies. In particular, Congress added a provision, codified at 26 U.S.C. 6503(f)(1), that suspends the running of the otherwise applicable ten-year collection period (see 26 U.S.C. 6502(a)(1)) from the date that the IRS seizes property by levy until "the date on which a judgment secured pursuant to section 7426 with respect

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[3] If, however, a third party seeks additional damages (pursuant to a provision added by Congress in 1998, see Internal Revenue Service Restructuring and Reform Act of 1998 (IRS Reform Act), Pub. L. No. 105-206, § 3102(b), 112 Stat. 730), based on allegedly reckless, intentional, or negligent disregard by the IRS of the provisions of the Internal Revenue Code, a party must exhaust the administrative remedies set forth in 26 U.S.C. 7433(d). See 26 U.S.C. 7426(h)(2).

to such property becomes final, and for 30 days thereafter." See 1966 Act, § 106(c), 80 Stat. 1140. But there is no comparable statutory provision that similarly suspends the collection period during the pendency of a tax-refund suit.

Accordingly, as the facts of this case illustrate, allowing a challenge to an IRS levy to be brought as a tax-refund suit may impede the tax collection process and disrupt Congress's carefully integrated statutory scheme. The IRS generally may collect a tax by levy or judicial proceeding within ten years after assessment. See 26 U.S.C. 6502(a)(1). Here, for example, the IRS levied on petitioner's property in 1999 to collect taxes assessed in 1993 and 1994 for the Cullers's 1981 through 1984 tax years. J.A. 30-32. It is now more than ten years since the assessments were made. If petitioner were to prevail in this action by obtaining a refund of the amounts collected by levy, it could potentially be too late for the IRS to collect the Cullers's unpaid taxes from other sources.

c. The carefully reticulated statutory provisions creating the wrongful-levy remedy thus reflect a legislative recognition that protracted disputes over tax collection impair the government's ability to protect its revenues. Congress enacted those provisions in light of the Treasury Department's expressed concern that, "[s]ince after seizure of property for nonpayment of taxes a district director [of Internal Revenue] is likely to suspend further collection activities against the taxpayer, it is essential that he be advised promptly if he has seized property which does not belong to the taxpayer." *Hearings on H.R. 11256 and H.R. 11290 Before the House Comm. on Ways and Means*, 89th Cong., 2d Sess. 36, 57-58 (1966) (*House Hearings*) (statement of Stanley S.

Surrey, Assistant Secretary of the Treasury). The Treasury Department sought the provision suspending its limitation period on collection actions against the taxpayer during the pendency of a wrongful-levy action for a similar reason. *Id.* at 56.[4]

Courts have repeatedly recognized that the nine-month limitation period for a wrongful-levy suit reflects Congress's concern that challenges to the IRS's tax collection efforts from third-party sources must be promptly resolved. See, *e.g.*, *Dahn* v. *United States*, 127 F.3d 1249, 1253 (10th Cir. 1997) (nine-month limitation "effectuated Congress' judgment" that government needs to know quickly if it must collect from an alternate source); *Gordon* v. *United States*, 649 F.2d 837, 843 (Ct. Cl. 1981) ("Congress was clearly concerned that levy contests more than 9 months after the levy would prevent ultimate collection of the tax, thereby endangering the federal treasury."); *United Sand & Gravel Contractors, Inc.* v. *United States*, 624 F.2d 733, 739 (5th Cir. 1980) ("[Section] 6532(c) protects the legitimate interest of the United States in requiring other claimants of the seized property to bring their claims quickly."). As the Tenth Circuit reasoned in *Dieckmann* v. *United States*, 550 F.2d 622 (1977) (per curiam), the nine-month period balances the "rights and duties of the individual" and the "needs of the government" by pro-

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[4] See also *House Hearings* 72 (statement of Laurens Williams, Chairman, Special Committee on Federal Liens, American Bar Association) ("A short (9 month) statute of limitations is provided, because it is important to get such controversies decided quickly so the Government may pursue the taxpayer's own property if it made a mistake the first time. The statute of limitations for collecting a corresponding amount from the taxpayer would be suspended during the pendency of such a controversy.").

viding a sufficient window of opportunity for owners of property who "exercise reasonable diligence in looking after it" while mandating relatively prompt filings so as "to permit the [IRS] to function with some reasonable dispatch." *Id.* at 624.

d. Petitioner suggests (Pet. Br. 21) that the respective limitation periods for bringing a wrongful-levy action and a tax-refund suit are not "materially different." That suggestion is at odds with the facts of this case; the difference is obviously "material" here, because petitioner's action is barred under one limitation period but not the other. More generally, there is in fact a significant difference between the limitation periods for tax-refund and wrongful-levy actions. Under 26 U.S.C. 6532(c), a wrongful-levy suit generally must be brought within nine months after the levy. That period can be extended by at most 12 additional months if the claimant properly puts the IRS on notice that it disputes the levy within the initial nine-month period. 26 U.S.C. 6532(c)(2). That provision underscores that, in all events, the IRS needs notice of the dispute within nine months.

By contrast, a tax-refund suit may be brought many years after a challenged tax is paid. Section 6511(a) allows an administrative refund claim to be filed up to two years after a tax is paid or up to three years after a return is filed, whichever is later, and 26 U.S.C. 6532(a) permits the filing of a tax-refund suit up to two years after the IRS disallows the refund claim. The combined effect of those provisions is to create a limitation period of at least four years, plus the additional time period during which the IRS is considering the administrative refund claim. The limitation period for tax-refund suits is therefore at least twice as long as the limitation pe-

riod for wrongful-levy suits, a difference that courts have consistently recognized as significant.

2. Congress understood that the availability of any other remedy to third parties was "problematic"

Congress enacted Section 7426 to fill a perceived gap in the then-existing remedial scheme for wrongful levies. Congress believed that the existence of any effective remedy for third parties whose property had been levied upon to collect the taxes of another was, at a minimum, "problematic." See *Block*, 461 U.S. at 285; *Brown*, 425 U.S. at 828. Section 7426 resolved that problem, providing a specific mechanism to implement Congress's view that "where the Government levies on property which, in part at least, a third person considers to be his, he is entitled to have his case heard in court." S. Rep. No. 1708, 89th Cong., 2d Sess. 29 (1966).

Section 7426 was enacted in 1966 against a background understanding that no tax-refund remedy against the government was available for third parties who sought to challenge tax levies as wrongful. Although tax-refund suits by taxpayers were permitted directly against the government under Section 1346(a)(1) at that time, see *Flora*, 362 U.S. at 148-156, the Committee Reports explained that "[u]nder present law * * *, the United States cannot be sued by third persons where its collection activities interfere with their property rights." S. Rep. No. 1708, *supra* at 29; H.R. Rep. No. 1884, 89th Cong., 2d Sess. 27 (1966) (same). That rule was understood to apply when "the Government wrongfully levies on one person's property in attempting to collect from a taxpayer," because courts had not found a waiver of sovereign immunity that allowed a nontaxpayer to sue the United States for an al-

legedly wrongful tax levy. *Ibid.*; see, *e.g.*, *Phillips* v. *United States*, 346 F.2d 999, 1000 (2d Cir. 1965); *First Nat'l Bank* v. *United States*, 265 F.2d 297, 300 (3d Cir. 1959).

Petitioner claims (Pet. Br. 17-19) that the legislative history of Section 7426 "cannot be fairly read" to demonstrate that Congress enacted the statute to provide a remedy in situations where wronged parties had previously been without relief. To be sure, the Senate Report acknowledged that actions against individual IRS employees were available in at least some jurisdictions, noting that "some courts" had allowed "suits to be brought against [IRS] district directors." S. Rep. No. 1708, *supra*, at 29; accord H.R. Rep. No. 1884, *supra*, at 27. But such suits were viewed as both inadequate and inappropriate mechanisms for challenging IRS levies. S. Rep. No. 1708, *supra*, at 29 (noting that "present law does not adequately take into account rights of third parties"); accord H.R. Rep. No. 1884, *supra*, at 27. Thus, the Senate Report concluded that it is "more appropriate" to bring such an action "directly against the Government," S. Rep. No. 1708, *supra*, at 29, and Congress replaced any remedy against individual IRS employees with an exclusive remedy directly against the United States under Section 7426. See 26 U.S.C. 7426(d) and (e). That was the Treasury Department's understanding at the time, and it so informed Congress. See *House Hearings* 57 (statement of Stanley S. Surrey, Assistant Secretary of the Treasury) ("The remedy provided by new section 7426 will be the exclusive means of

redress for actions which may be brought under this section.").[5]

3. Congress created a detailed, comprehensive scheme

Other provisions of the 1966 Act confirm that Congress intended Section 7426 to be a comprehensive scheme providing the sole remedy for wrongful levies on the property of third parties. Section 7426 provides both pre- and post-deprivation relief, allowing a party to file suit "without regard" to whether the property in which it claims an interest "has been surrendered to or sold by" the government. 26 U.S.C. 7426(a)(1). Section 7426 also delineates the only forms of relief that a court has jurisdiction to provide, authorizing an injunction against a levy or sale, recovery of the property, or a money judgment in an amount determined in accordance with specific statutory rules, 26 U.S.C. 7426(b), plus interest. 26 U.S.C. 7426(g).[6] In addition, Section 7426

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[5] The cases to which petitioner cites (Pet. Br. 6-7) for the proposition that third parties affected by allegedly wrongful levies had an available remedy even before the enactment of Section 7426 are, with one exception, cases brought against individual officers of the IRS, and thus are the types of actions that the drafters of Section 7426 considered insufficient. The sole exception, *United States* v. *Worley*, 213 F.2d 509 (6th Cir. 1954), cert. denied, 348 U.S. 917 (1955), provides no support for petitioner, because in that case the court of appeals ultimately found that there was no jurisdiction to enter judgment against the United States. *Id.* at 512. In any event, to the extent that a handful of courts had allowed actions directly against the government despite the established principle that the United States cannot be sued absent an applicable waiver of sovereign immunity, the important point for present purposes is that Congress did not believe such suits were available at the time it enacted Section 7426. See *Brown*, 425 U.S. at 828.

[6] As noted, see note 3, *supra*, in 1998 Congress provided for additional damages if the court finds that any officer or employee of the IRS

restricts the issues that a third party can litigate: for claims under Section 7426, "the assessment of tax upon which the interest or lien of the United States is based shall be conclusively presumed to be valid." 26 U.S.C. 7426(c).

Further evidence that Congress viewed the remedy in Section 7426(a)(1) as exclusive is Congress's creation of distinct jurisdictional and venue provisions for actions brought under Section 7426. Congress did not rely upon the pre-existing jurisdictional grant in Section 1346(a)(1) over civil actions for the recovery of erroneously collected taxes. See 28 U.S.C. 1346(a)(1). Instead, Congress created a new subsection (e) within Section 1346 to grant district courts jurisdiction over "any civil action against the United States provided in section 7426." See 1966 Act, § 202(a), 80 Stat. 1148, codified, as subsequently amended, at 28 U.S.C. 1346(e). Moreover, Congress created a specific venue provision for Section 7426 actions. § 202(b), 80 Stat. 1149. In contrast to the venue provision for tax-refund actions, which generally allows a plaintiff to sue the government "in the judicial district where the plaintiff resides," 28 U.S.C. 1402(a), Congress permitted the United States to be sued under Section 7426(a)(1) "only in the judicial district where the property is situated at the time of levy." § 202(b), 80 Stat. 1149, codified at 28 U.S.C. 1402(c). Allowing a third party to choose between a tax-refund suit or a wrongful-levy action would permit the circumvention

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"recklessly or intentionally, or by reason of negligence, disregarded any provision" of Title 26. 26 U.S.C. 7426(h)(1); see IRS Reform Act, § 3102(b), 112 Stat. 730.

of that restriction in cases where the two venues are distinct.[7]

4. Principles of sovereign immunity dictate that Section 7426 is an exclusive remedy

Under principles of sovereign immunity, any doubt about whether Section 7426(a)(1) is an exclusive remedy must be resolved in favor of the government. See *BP Am. Prod. Co.* v. *Burton*, 127 S. Ct. 638, 646 (2006). It is axiomatic that the United States cannot be sued unless Congress has waived the government's sovereign immunity, and such waivers are strictly construed. See, *e.g.*, *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 33, 34, 37 (1992); *United States* v. *Dalm*, 494 U.S. 596, 608 (1990). Terms and conditions that Congress attaches to the legislative waiver of sovereign immunity are also strictly construed. *Block*, 461 U.S. at 287. "A statute of limitations requiring that a suit against the Government be brought within a certain time period is one of those terms." *Dalm*, 494 U.S. at 608; see *Block*, 461 U.S. at 287.

Thus, when a party fails to commence a suit against the United States within the limitation period, the government has not waived its sovereign immunity, and the courts lack jurisdiction to entertain the suit. *Dalm*, 494 U.S. at 608-610. And even when Congress has provided one statute of limitations for a general class of actions,

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[7] Petitioner's reliance (Pet. Br. 20) on *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148 (1976), and *Morton* v. *Mancari*, 417 U.S. 535 (1974), is misplaced. In both cases, the Court held that subsequently-enacted general statutes did not impliedly repeal earlier, more specific statutes. See *Radzanower*, 426 U.S. at 153-154, 158; *Morton*, 417 U.S. at 550-551. If anything, those cases support the exclusivity of the more specific provision in Section 7426(a)(1).

it nevertheless can "provide less liberally for particular actions which, because of special considerations, require[] different treatment." *A.S. Kreider Co.*, 313 U.S. at 447. Congress has done precisely that with respect to wrongful-levy actions under Section 7426(a)(1). To allow parties in petitioner's situation to avoid that limitation on Congress's waiver of the United States' sovereign immunity by filing a tax-refund action, would improperly permit Congress's "careful and thorough remedial scheme to be circumvented by artful pleading." *Brown*, 425 U.S. at 833.

5. The court of appeals correctly held that Section 7426(a)(1) provides petitioner's exclusive remedy

Given the "balance, completeness, and structural integrity" of the wrongful-levy remedy, the court of appeals correctly held that Section 7426(a)(1) afforded the exclusive remedy available to petitioner to assert its claim, and that petitioner could not circumvent the limitation period applicable to such actions by pursuing a tax-refund suit under 28 U.S.C. 1346(a)(1). That decision is in accord with a substantial line of precedent in which courts of appeals have rejected claims, including tax-refund claims, by property owners who were subject to an IRS levy to collect another's taxes, but who failed to challenge the levy within the limitation period provided by 26 U.S.C. 6532(c). See, *e.g.*, *Audio Invs.* v. *Robertson*, 67 Fed. Appx. 795, 797 (4th Cir. 2003) (per curiam) (unpublished) (holding that a third party who "failed to timely file a wrongful levy action * * * cannot circumvent this exclusive remedy by filing a quiet title action"); *Miller* v. *Tony & Susan Alamo Found.*, 134 F.3d 910, 916-917 (8th Cir. 1998) (holding that, where Section 7426(a)(1) applies, a garnishment action

premised on 28 U.S.C. 2410 is foreclosed); *Dahn*, 127 F.3d at 1253 (rejecting "attempt to circumvent the § 7426/§ 6532 time-bar" by invoking other "remedial sources," including Section 1346(a)(1));[8] *Williams* v. *United States*, 947 F.2d 37, 39 (2d Cir. 1991) (holding that the "two-year period set forth in section 6532(a)(1) for a refund of taxes does not apply" and that a wrongful-levy action is the "sole remedy available to an individual * * * who claims an interest in property that has been levied upon by the IRS for the purpose of satisfying the tax liability of another person"), cert. denied, 504 U.S. 942 (1992); *United Sand*, 624 F.2d at 738-739 (rejecting quiet-title claim brought by property owner under 28 U.S.C. 2410 more than nine months after a challenged levy on the ground that his "exclusive remedy" was a wrongful-levy action under Section 7426). But see *WWSM Investors* v. *United States*, 64 F.3d 456 (9th Cir. 1995) (discussed at pp. 30-32, *infra*).[9]

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[8] See *Dahn* v. *United States*, No. 93-C-953, 1996 WL 652787, at *4 (D. Utah Aug. 30, 1996) (stating that Dahn invoked 28 U.S.C. 1346(a)(1)).

[9] Even those courts that have suggested that challenges to levies by third parties may be labeled as other types of actions have nevertheless applied the statute of limitations for wrongful-levy actions. See *Gordon*, 649 F.2d at 843-844 (refusing to apply six-year statute of limitations generally applicable to claims brought under the jurisdiction of the Tucker Act, 28 U.S.C. 1491); *Dieckmann*, 550 F.2d at 623-624 (holding that an equitable action brought against the government 14 months after a levy on plaintiffs' property was barred by the nine-month limitation period of 26 U.S.C. 6532(c)).

C. This Court's Decision In *United States* v. *Williams* Does Not Affect The Exclusivity Of The Section 7426(a)(1) Remedy

1. Petitioner errs in contending (Pet. Br. 10-12, 22-23) that a different result is required by this Court's decision in *United States* v. *Williams*, 514 U.S. 527 (1995). In that case, the Court held that Williams, who had paid under protest a tax that the IRS had assessed against her ex-husband, had standing to bring a refund action under 28 U.S.C. 1346(a)(1). The Court rejected the government's argument that tax-refund suits were available only to "taxpayers" against whom the taxes at issue had actually been assessed. 514 U.S. at 532-536.

In so holding, the Court concluded that none of the remedies that are potentially available to a third party when the IRS pursues her assets to satisfy the tax liability of another was "realistically open to Williams." *Williams*, 514 U.S. at 536. In particular, the Court observed that she could not have filed a wrongful-levy action under Section 7426, because the collection measure at issue was a tax *lien* rather than a *levy*: "[i]f the Government has not levied on property—as it has not levied on Williams' home—the owner cannot challenge such a levy under 26 U.S.C. § 7426." *Ibid.* Thus, emphasizing that Williams was otherwise "without a remedy," the Court concluded that "Congress did not intend refund actions under § 1346(a)(1) to be unavailable to persons situated as Lori Williams is." *Ibid.*; see *id.* at 529 ("[Williams] had no realistic alternative to payment of a tax she did not owe, and we do not believe Congress in-

tended to leave parties in respondent's position without a remedy.") (footnote omitted).[10]

Petitioner contends (Pet. Br. 12) that *Williams* "must * * * stand for the proposition that Congress did not generally intend for 28 U.S.C. § 1346 to be unavailable to third parties." But the *Williams* Court did

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[10] In the wake of *Williams*, Congress enacted 26 U.S.C. 6325(b)(4)(A) and 7426(a)(4), which give persons in Williams' situation a remedy apart from a tax-refund suit. See IRS Reform Act, § 3106(a) and (b)(1), 112 Stat. 732-733. Section 6325(b)(4)(A) allows a third party whose property is subject to a tax lien to request a certificate of discharge of the lien on his property and provides that the IRS shall issue such a certificate if the property owner provides a deposit or a bond for an amount equal to the government's interest in the property. Section 7426(a)(4) allows a property owner who receives a certificate of discharge to file a civil action against the government in federal district court within 120 days after the certificate is issued "for a determination of whether the value of the interest of the United States (if any) in such property is less than the value determined by the Secretary." 26 U.S.C. 7426(a)(4).

Section 7426(a)(4) further provides that "[n]o other action may be brought by such person for such a determination." 26 U.S.C. 7426(a)(4). To the extent that this language reflects Congress's intent to make the remedy under Section 7426(a)(4) an exclusive one, that does not suggest that the pre-existing wrongful-levy remedy in Section 7426(a)(1) is not exclusive in situations to which it applies. Congress may have thought it necessary to include an exclusivity provision in Section 7426(a)(4) to address the situation in *Williams*; no such express provision was necessary in Section 7426(a)(1) because *Williams* does not suggest that a third party may pursue a tax-refund remedy in situations, like allegedly wrongful levies, for which Congress has provided a specific remedy. Moreover, Section 7426(a)(4), enacted in 1998 in direct response to this Court's decision in *Williams*, sheds no light on the intent of the 1966 Congress. In 1966, Congress clearly was not legislating against the backdrop of a Supreme Court case finding a remedy. If anything, Congress's preference for a relatively short statute of limitations in this context is consistent with the basic judgment reflected in 26 U.S.C. 6532(c) that the IRS needs relatively prompt notice of third-party challenges to its collection efforts.

not address the question whether third parties could sue under Section 1346(a)(1) in circumstances other than those presented in that case. And in particular, *Williams* sheds no light on the question whether a tax-refund suit would be available to a third party who, unlike Williams herself, *did* have an opportunity to seek relief under a separate statutory scheme specifically created to remedy the type of alleged wrong at issue. As the Tenth Circuit explained in *Dahn*, the *Williams* Court "was concerned solely with the reach of § 1346 per se; the exclusivity of a concurrent § 7426 claim was never in issue." 127 F.3d at 1253.

Petitioner thus errs in contending that *Williams* provides support for its effort to evade the constraints imposed by Congress on the wrongful-levy remedy. Indeed, this Court rejected a similar argument in *United States* v. *Demko*, 385 U.S. 149 (1966). In that case, the Court held that 18 U.S.C. 1426 provides the exclusive remedy for injuries suffered by a federal prisoner while performing work in prison, and precludes a prisoner's resort to the general remedy of the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.* See *Demko*, 385 U.S. at 383-385. The Court reached that result notwithstanding its earlier holding in *United States* v. *Muniz*, 374 U.S. 150 (1963), that two prisoners who were *not* covered by the prison compensation law could seek relief under the Federal Tort Claims Act. *Id.* at 160 & n.17. The *Demko* Court reasoned that "[t]he decision in *Muniz* could not possibly control our decision here because [the prisoner-claimant here] is protected by the prison compensation law." 385 U.S. at 153. That reasoning applies equally to this case as well.

Petitioner also attributes significance (Pet. Br. 11) to the Court's observation in *Williams* that a tax-refund

suit is a post-deprivation remedy, while wrongful-levy, quiet-title, and separate-fund actions are pre-deprivation remedies. 514 U.S. at 538. The distinction between pre- and post-deprivation remedies was significant in *Williams* because Williams had no "realistic[]" opportunity for pre-deprivation relief (*id.* at 536), and the Court declined in those circumstances to deny her post-deprivation relief. That distinction has no force here, however, where petitioner had available to it both a pre- and post-deprivation remedy under Section 7426(a)(1). As noted, the owner of property subject to levy may challenge the levy either before or after the property has been surrendered to (or sold by) the IRS, 26 U.S.C. 7426(a)(1), as long as it does so within the limitation period set forth in 26 U.S.C. 6532(c).[11]

Furthermore, nothing in *Williams* calls into question the long line of authorities recognizing the need for a speedy resolution of property disputes where the IRS levies on a third party's property for the collection of another's unpaid taxes. See pp. 17-18, *supra*. Despite the general language of Section 1346(a)(1), Congress "provid[ed] less liberally" for parties whose property

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[11] As petitioner suggests (Pet. Br. 22; see *id.* at 12), because Section 7426(a)(1) is both a pre- and post-deprivation remedy, it would not be rendered altogether "superfluous" if a post-deprivation tax-refund remedy were also available, because the restrictions applicable to wrongful-levy actions would continue to apply to third parties seeking a pre-deprivation remedy. But rendering a statute superfluous in fully half its applications is no small feat. Allowing third parties to resort to the Section 1346(a)(1) post-deprivation remedy would permit them to circumvent the restrictions of Section 7426 in post-deprivation situations, thereby rendering the restrictions superfluous in cases such as this one, notwithstanding Congress's unambiguous decision to encompass post-deprivation relief within the wrongful-levy remedial scheme.

has been subjected to such a levy because of "special considerations, requir[ing] different treatment." *A.S. Kreider Co.*, 313 U.S. at 447; see, *e.g.*, *United Sand*, 624 F.2d at 738. As the court below and the Tenth Circuit have properly recognized, *Williams* did not "overturn, sub silentio, the separate and well-established principle that § 7426 provides the exclusive remedy for a wrongful levy." *Dahn*, 127 F.3d at 1253; accord Pet. App. 5a-6a. Moreover, Congress's response to *Williams* only underscores the need for prompt notice to the IRS when third parties challenge the IRS's collection efforts. See note 10, *supra*.

2. As petitioner notes (Pet. Br. 12-14), in *WWSM Investors* v. *United States*, 64 F.3d 456 (1995), the Ninth Circuit interpreted this Court's decision in *Williams* to open the door to tax-refund actions for third parties, like petitioner, who could avail themselves of the Section 7426(a)(1) remedy. That decision is incorrect.

In *WWSM Investors*, a third party subject to an IRS levy filed an untimely wrongful-levy action, and then moved for leave to amend the complaint to include a claim for a tax refund under 28 U.S.C. 1346(a)(1). Although the Ninth Circuit held that the Section 7426 claim was time-barred, it held that WWSM Investors "may file suit for a refund under 28 U.S.C. § 1346(a)(1)." 64 F.3d at 459. The Ninth Circuit believed that this Court's decision in *Williams* "control[led]" the case because it viewed the levy in *WWSM Investors* as "functionally equivalent" to Williams's payment to discharge the lien in *Williams*. *Ibid.* As the dissent in *WWSM Investors* correctly observed, however, this Court's decision in *Williams* acknowledged the critical difference between liens and levies and "recognized that Williams could not use the remedy of 26 U.S.C. § 7426 because

there was no levy." *Id.* at 459 (Brunetti, J., dissenting). As such, the decision in *Williams* "did not allow that a non-levy remedy under § 1346(a)(1) was available when the exclusive levy remedy under § 7426 was barred by the statute of limitations." *Id.* at 459-460 (Brunetti, J., dissenting).

WWSM Investors was decided shortly after this Court's decision in *Williams*.[12] No other court of appeals has followed the Ninth Circuit in reading *Williams* to open federal courts to tax-refund suits by parties who could have brought a timely wrongful-levy action but failed to do so. To the contrary, both the Fifth Circuit in this case and the Tenth Circuit in *Dahn* have noted, but have declined to follow, the Ninth Circuit's approach. Pet. App. 6a; *Dahn*, 127 F.3d at 1253 & n.2.[13] Moreover, apart from refund actions, courts of appeals (including the Ninth Circuit) have continued to reject attempts to circumvent the limitation period on wrongful-levy actions through the use of other types of claims. See *Audio Invs.*, 67 Fed. Appx. at 797 (rejecting a quiet-title

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[12] This Court decided *Williams* on April 25, 1995. 514 U.S. 527. The Ninth Circuit issued its initial decision in *WWSM Investors* on May 31, 1995; after the government filed a petition for rehearing, the court replaced its initial opinion with a majority opinion and a dissent on August 22, 1995. See 64 F.3d at 456-457.

[13] The IRS has issued a Revenue Ruling agreeing with *Dahn* and the approach taken below, and rejecting the Ninth Circuit's holding in *WWSM Investors*. See Rev. Rul. 05-49, 2005-30 I.R.B. 126 (2005). The IRS reasons that this Court's decision in *Williams* was premised on the Court's conclusion that "in the absence of a refund suit, the third person would have no meaningful judicial remedy." *Ibid.* Noting "the established principle that section 7426 is the exclusive remedy in the case of a wrongful levy," the IRS indicated its intent to continue to hew to that longstanding view. *Ibid.*; see *House Hearings* 57 (statement of Stanley S. Surrey, Assistant Secretary of the Treasury).

action); *Miller* v. *Tony & Susan Alamo Found.*, 134 F.3d 910, 916 (8th Cir. 1998) (rejecting garnishment action); *Fidelity & Deposit Co.* v. *City of Adelanto*, 87 F.3d 334, 335 (9th Cir. 1996) (rejecting quiet-title action).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

STATUTORY PROVISIONS INVOLVED

1. 26 U.S.C. 6325 provides, in pertinent part:

Release of lien or discharge of property

* * * * *

(b) Discharge of property

* * * * *

(4) Right of substitution of value

(A) In general

At the request of the owner of any property subject to any lien imposed by this chapter, the Secretary shall issue a certificate of discharge of such property if such owner—

(i) deposits with the Secretary an amount of money equal to the value of the interest of the United States (as determined by the Secretary) in the property; or

(ii) furnishes a bond acceptable to the Secretary in a like amount.

(B) Refund of deposit with interest and release of bond

The Secretary shall refund the amount so deposited (and shall pay interest at the overpayment rate under section 6621), and shall release such bond, to the extent that the Secretary determines that—

(i) the unsatisfied liability giving rise to the lien can be satisfied from a source other than such property; or

(ii) the value of the interest of the United States in the property is less than the Secretary's prior determination of such value.

(C) Use of deposit, etc., if action to contest lien not filed

If no action is filed under section 7426(a)(4) within the period prescribed therefor, the Secretary shall, within 60 days after the expiration of such period—

(i) apply the amount deposited, or collect on such bond, to the extent necessary to satisfy the unsatisfied liability secured by the lien; and

(ii) refund (with interest as described in subparagraph (B)) any portion of the amount deposited which is not used to satisfy such liability.

(D) Exception

Subparagraph (A) shall not apply if the owner of the property is the person whose unsatisfied liability gave rise to the lien.

2. 26 U.S.C. 6502 provides, in pertinent part:

Collection after assessment

(a) Length of period

Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun—

(1) within 10 years after the assessment of the tax, or

(2) if—

(A) there is an installment agreement between the taxpayer and the Secretary, prior to the date which is 90 days after the expiration of any period for collection agreed upon in writing by the Secretary and the taxpayer at the time the installment agreement was entered into; or

(B) there is a release of levy under section 6343 after such 10-year period, prior to the expiration of any period for collection agreed upon in writing by the Secretary and the taxpayer before such release.

If a timely proceeding in court for the collection of a tax is commenced, the period during which such tax may be collected by levy shall be extended and shall not expire until the liability for the tax (or a judgment against the taxpayer arising from such liability) is satisfied or becomes unenforceable.

(b) Date when levy is considered made

The date on which a levy on property or rights to property is made shall be the date on which the notice of seizure provided in section 6335(a) is given.

* * * * *

3. 26 U.S.C. 6503 provides, in pertinent part:

Suspension of running of period of limitation

* * * * *

(f) Wrongful seizure of or lien on property of third party

(1) Wrongful seizure

The running of the period under section 6502 shall be suspended for a period equal to the period from the

date property (including money) of a third party is wrongfully seized or received by the Secretary to the date the Secretary returns property pursuant to section 6343(b) or the date on which a judgment secured pursuant to section 7426 with respect to such property becomes final, and for 30 days thereafter. The running of such period shall be suspended under this paragraph only with respect to the amount of such assessment equal to the amount of money or the value of specific property returned.

(2) Wrongful lien

In the case of any assessment for which a lien was made on any property, the running of the period under section 6502 shall be suspended for a period equal to the period beginning on the date any person becomes entitled to a certificate under section 6325(b)(4) with respect to such property and ending on the date which is 30 days after the earlier of—

(A) the earliest date on which the Secretary no longer holds any amount as a deposit or bond provided under section 6325(b)(4) by reason of such deposit or bond being used to satisfy the unpaid tax or being refunded or released; or

(B) the date that the judgment secured under section 7426(b)(5) becomes final.

The running of such period shall be suspended under this paragraph only with respect to the amount of such assessment equal to the value of the interest of the United States in the property plus interest, penalties, additions to the tax, and additional amounts attributable thereto.

* * * * *

4. 26 U.S.C. 6511 provides, in pertinent part:

Limitations on credit or refund

(a) Period of limitation on filing claim

Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid.

* * * * *

5. 26 U.S.C. 6532 provides, in pertinent part:

Periods of limitation on suits

(a) Suits by taxpayers for refund

(1) General rule

No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.

(2) Extension of time

The 2-year period prescribed in paragraph (1) shall be extended for such period as may be agreed upon in writing between the taxpayer and the Secretary.

* * * * *

(c) Suits by persons other than taxpayers

(1) General rule

Except as provided by paragraph (2), no suit or proceeding under section 7426 shall be begun after the expiration of 9 months from the date of the levy or agreement giving rise to such action.

(2) Period when claim is filed

If a request is made for the return of property described in section 6343(b), the 9-month period prescribed in paragraph (1) shall be extended for a period of 12 months from the date of filing of such request or for a period of 6 months from the date of mailing by registered or certified mail by the Secretary to the person making such request of a notice of disallowance of the part of the request to which the action relates, whichever is shorter.

6. 26 U.S.C. 7422 provides, in pertinent part:

Civil actions for refund

(a) No suit prior to filing claim for refund

No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for

refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

(b) Protest or duress

Such suit or proceeding may be maintained whether or not such tax, penalty, or sum has been paid under protest or duress.

* * * * *

(f) Limitation on right of action for refund

(1) General rule

A suit or proceeding referred to in subsection (a) may be maintained only against the United States and not against any officer or employee of the United States (or former officer or employee) or his personal representative. Such suit or proceeding may be maintained against the United States notwithstanding the provisions of section 2502 of title 28 of the United States Code (relating to aliens' privilege to sue) and notwithstanding the provisions of section 1502 of such title 28 (relating to certain treaty cases).

(2) Misjoinder and change of venue

If a suit or proceeding brought in a United States district court against an officer or employee of the United States (or former officer or employee) or his personal representative is improperly brought solely by virtue of paragraph (1), the court shall order, upon such terms as are just, that the pleadings be amended to substitute the United States as a party for such officer or employee as of the time such action commenced, upon proper service of process on the United

States. Such suit or proceeding shall upon request by the United States be transferred to the district or division where it should have been brought if such action initially had been brought against the United States.

* * * * *

(j) Cross references

(1) For provisions relating generally to claims for refund or credit, see chapter 65 (relating to abatements, credit, and refund) and chapter 66 (relating to limitations).

(2) For duty of United States attorneys to defend suits, see section 507 of Title 28 of the United States Code.

(3) For jurisdiction of United States district courts, see section 1346 of Title 28 of the United States Code.

(4) For payment by the Treasury of judgments against internal revenue officers or employees, upon certificate of probable cause, see section 2006 of Title 28 of the United States Code.

7. 26 U.S.C. 7426 provides, in full:

Civil actions by persons other than taxpayers

(a) Actions permitted

(1) Wrongful levy

If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the

United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary.

(2) Surplus proceeds

If property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property junior to that of the United States and to be legally entitled to the surplus proceeds of such sale may bring a civil action against the United States in a district court of the United States.

(3) Substituted sale proceeds

If property has been sold pursuant to an agreement described in section 6325(b)(3) (relating to substitution of proceeds of sale), any person who claims to be legally entitled to all or any part of the amount held as a fund pursuant to such agreement may bring a civil action against the United States in a district court of the United States.

(4) Substitution of value

If a certificate of discharge is issued to any person under section 6325(b)(4) with respect to any property, such person may, within 120 days after the day on which such certificate is issued, bring a civil action against the United States in a district court of the United States for a determination of whether the value of the interest of the United States (if any) in such property is less than the value determined by the Secretary. No other action may be brought by such person for such a determination.

(b) Adjudication

The district court shall have jurisdiction to grant only such of the following forms of relief as may be appropriate in the circumstances:

(1) Injunction

If a levy or sale would irreparably injure rights in property which the court determines to be superior to rights of the United States in such property, the court may grant an injunction to prohibit the enforcement of such levy or to prohibit such sale.

(2) Recovery of property

If the court determines that such property has been wrongfully levied upon, the court may—

(A) order the return of specific property if the United States is in possession of such property;

(B) grant a judgment for the amount of money levied upon; or

(C) if such property was sold, grant a judgment for an amount not exceeding the greater of—

(i) the amount received by the United States from the sale of such property, or

(ii) the fair market value of such property immediately before the levy.

For the purposes of subparagraph (C), if the property was declared purchased by the United States at a sale pursuant to section 6335(e) (relating to manner and conditions of sale), the United States shall be treated as having received an amount equal to the minimum price determined pursuant to such section or (if

larger) the amount received by the United States from the resale of such property.

(3) Surplus proceeds

If the court determines that the interest or lien of any party to an action under this section was transferred to the proceeds of a sale of such property, the court may grant a judgment in an amount equal to all or any part of the amount of the surplus proceeds of such sale.

(4) Substituted sale proceeds

If the court determines that a party has an interest in or lien on the amount held as a fund pursuant to an agreement described in section 6325(b)(3) (relating to substitution of proceeds of sale), the court may grant a judgment in an amount equal to all or any part of the amount of such fund.

(5) Substitution of value

If the court determines that the Secretary's determination of the value of the interest of the United States in the property for purposes of section 6325(b)(4) exceeds the actual value of such interest, the court shall grant a judgment ordering a refund of the amount deposited, and a release of the bond, to the extent that the aggregate of the amounts thereof exceeds such value determined by the court.

(c) Validity of assessment

For purposes of an adjudication under this section, the assessment of tax upon which the interest or lien of the United States is based shall be conclusively presumed to be valid.

(d) Limitation on rights of action

No action may be maintained against any officer or employee of the United States (or former officer or employee) or his personal representative with respect to any acts for which an action could be maintained under this section.

(e) Substitution of United States as party

If an action, which could be brought against the United States under this section, is improperly brought against any officer or employee of the United States (or former officer or employee) or his personal representative, the court shall order, upon such terms as are just, that the pleadings be amended to substitute the United States as a party for such officer or employee as of the time such action was commenced upon proper service of process on the United States.

(f) Provision inapplicable

The provisions of section 7422(a) (relating to prohibition of suit prior to filing claim for refund) shall not apply to actions under this section.

(g) Interest

Interest shall be allowed at the overpayment rate established under section 6621—

(1) in the case of a judgment pursuant to subsection (b)(2)(B), from the date the Secretary receives the money wrongfully levied upon to the date of payment of such judgment;

(2) in the case of a judgment pursuant to subsection (b)(2)(C), from the date of the sale of the property wrongfully levied upon to the date of payment of such judgment; and

(3) in the case of a judgment pursuant to subsection (b)(5) which orders a refund of any amount, from the date the Secretary received such amount to the date of payment of such judgment.

(h) Recovery of damages permitted in certain cases

(1) In general

Notwithstanding subsection (b), if, in any action brought under this section, there is a finding that any officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence, disregarded any provision of this title the defendant shall be liable to the plaintiff in an amount equal to the lesser of $1,000,000 ($100,000 in the case of negligence) or the sum of—

(A) actual, direct economic damages sustained by the plaintiff as a proximate result of the reckless or intentional or negligent disregard of any provision of this title by the officer or employee (reduced by any amount of such damages awarded under subsection (b)); and

(B) the costs of the action.

(2) Requirement that administrative remedies be exhausted; mitigation; period

The rules of section 7433(d) shall apply for purposes of this subsection.

(3) Payment authority

Claims pursuant to this section shall be payable out of funds appropriated under section 1304 of title 31, United States Code.

(i) Cross reference

For period of limitation, see section 6532(c).

8. 28 U.S.C. 1346 provides, in pertinent part:

United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of :

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

* * * * *

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1986.

* * * * *

9. 28 U.S.C. 1402 provides, in pertinent part:

United States as defendant

(a) Any civil action in a district court against the United States under subsection (a) of section 1346 of this title may be prosecuted only:

(1) Except as provided in paragraph (2), in the judicial district where the plaintiff resides;

(2) In the case of a civil action by a corporation under paragraph (1) of subsection (a) of section 1346, in the

judicial district in which is located the principal place of business or principal office or agency of the corporation; or if it has no principal place of business or principal office or agency in any judicial district (A) in the judicial district in which is located the office to which was made the return of the tax in respect of which the claim is made, or (B) if no return was made, in the judicial district in which lies the District of Columbia. Notwithstanding the foregoing provisions of this paragraph a district court, for the convenience of the parties and witnesses, in the interest of justice, may transfer any such action to any other district or division.

* * * * *

(c) Any civil action against the United States under subsection (e) of section 1346 of this title may be prosecuted only in the judicial district where the property is situated at the time of levy, or if no levy is made, in the judicial district in which the event occurred which gave rise to the cause of action.

* * * * *

GRANTED

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IN THE

Supreme Court of the United States

EC TERM OF YEARS TRUST,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF

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This case presents a question of whether Congress intended that 26 U.S.C. § 7426 be the sole and exclusive remedy available to a third party whose property has been seized under a levy to satisfy taxes due by other taxpayers or whether Congress intended that the refund statute, 28 U.S.C. § 1346, continue to be available to a third party regardless of whether the third party failed to file a timely claim under 26 U.S.C. § 7426. Congressional intent evidenced by the language of 26 U.S.C. § 7426 indicates that this statute did not preempt 28 U.S.C. § 1346 and did not become an exclusive remedy. Congressional intent as evidenced by reference to legislative history also indicates that Congress did not intend for 26 U.S.C. § 7426 to be the sole and exclusive remedy for a wrongful levy. Further, reasonable inferences drawn from the structure of 26 U.S.C. § 7426 do not support the conclusion that it was intended by Congress to be a sole and exclusive remedy for a wrongful levy. The Fifth Circuit erroneously concluded that Congress intended that 26 U.S.C § 7426 be the sole and exclusive remedy from the legislative history due to the fact that 26 U.S.C. § 7426 had a shorter statute of limitations than 28 U.S.C. § 1346. This Court should reverse the Fifth Circuit's judgment and hold that 28 U.S.C. § 1346 is available to a third party whose property has been seized through a wrongful levy even if the third party had an opportunity to utilize 26 U.S.C. § 7426.

STATEMENT OF THE CASE

In 1991, Elmer W. Cullers, Jr. and Dorothy Cullers created the EC Term of Years Trust to reduce the impact of federal estate taxes on their estates. In 1993, the Internal Revenue Service assessed additional federal income taxes, penalties and interest against Elmer W. Cullers, Jr. and Dorothy Cullers for tax years 1981 through 1984. In 1999, claiming that the Cullers had transferred property to the EC Term of Years Trust to avoid paying federal income taxes, the Internal Revenue Service filed transferee tax liens against the EC Term of Years Trust for the tax liability owed by the Cullers.

In 1999, the Internal Revenue Service threatened to take legal action against the EC Term of Years Trust to seize and sell its property to satisfy the tax obligations of the Cullers. To avoid the sale of its property, in 1999 the EC Term of Years Trust deposited the total amount of taxes, penalties and interest due by Elmer W. Cullers, Jr. and Dorothy Cullers in a bank account and notified the Internal Revenue Service so that it could levy on the account. On September 10, 1999, the IRS levied on the bank account established by EC Term of Years Trust, which contained $3,389,426.37, and seized all funds therein to satisfy the tax liabilities owed by the Cullers. (Joint Appendix, paragraph 8 of Exhibit B attached to Exhibit D)

In September 2000, EC Term of Years Trust and other entities filed a complaint for a wrongful levy under 26 U.S.C. § 7426; however, the complaint was filed more than nine months after the levy. On December 28, 2000, the District Court dismissed the complaint for wrongful levy for lack of subject matter jurisdiction because it had been filed more than nine months after the levy and was time barred under 26 U.S.C. § 7426.

On September 6, 2001, EC Term of Years Trust filed an administrative claim for a refund for the amount seized by the Internal Revenue Service under the levy. After the claim for a refund was denied, on September 6, 2001, EC Term of Years Trust filed a complaint for a refund of the $3,389,426.37 in the United States District Court for the Western District of Texas - El Paso Division under 28 U.S.C. § 1346. On November 22, 2004, the District Court held that Petitioner's sole remedy was under 26 U.S.C. § 7426 and dismissed Petitioner's Complaint for lack of subject matter jurisdiction.

Petitioner appealed the case to the Fifth Circuit in reliance on this Court's holding in *United States v. Williams*, 514 U.S. 527 (1995) and the Ninth Circuit Court of Appeal's

holding in *WWSM Investors v. United States*, 64 F.3d 456 (9th Cir. 1995). The Fifth Circuit held that the wrongful levy procedure under 26 U.S.C. § 7426 is the exclusive remedy for a wrongful levy and affirmed the dismissal of EC Term of Years Trust's Complaint for lack of subject matter jurisdiction.

ARGUMENT

A. Congressional intent, if not expressly made clear, can be determined only through reasonable inferences. This case should be decided by determining congressional intent without making unjustified inferences. Preemptive intent cannot be lightly inferred. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976). Preemptive design must be clear and manifest. *Blackfeet Indian Tribe v. Mont. Power Co.*, 838 F.2d 1055 (9th Cir. 1988, cert. den.)

Petitioner has pointed out in its brief that Congress did not expressly make § 7426(a)(1) the exclusive remedy in a wrongful levy context. Petitioner has also pointed out that Congress has expressly made other provisions of the Internal Revenue Code exclusive and could have done so with § 7426 had that been its intent.

Nevertheless, the Government argues that:

> Congress's creation of a specific remedy tailored to a particular set of circumstances will foreclose resort to a more general remedy. That result is clearly appropriate when, as here, the "balance, completeness and structural integrity" of the specific remedy suggest that it was intended by Congress to be the exclusive avenue of relief. Creation of a short statute of limitation for a specific remedy is a powerful indicator that

> Congress intended that remedy to be exclusive of other potential available remedies with longer limitations periods.

(Respondent's Brief, p. 7)

The Government also argues that "Most significantly, allowing third parties to pursue a tax-refund action in addition to a wrongful-levy action would effectively 'render[] nugatory' the shorter limitations period that Congress placed on wrongful levy actions . . ." (Respondent's Brief, pp. 7-8). Thus, because exclusivity was never expressly declared, the Government finds itself having to ask this Court to infer that Congress intended for § 7426 to be an exclusive remedy.

The phrase "balance, completeness and structural integrity" is a quote from *Brown v. General Services Admin.*, 425 U.S. 820, 832 (1976). In *Brown*, this Court held that the remedies made available to federal employees under the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972, were exclusive. Two principal factors appeared to support the holding in *Brown*. First, the Court believed that Congress was persuaded that federal employees who were treated discriminatorily had no effective judicial remedy. *Brown*, 425 U.S. at 828. Second, the Court observed that the Civil Rights Act was a "careful blend of administrative and judicial enforcement powers." *Brown*, 425 U.S. at 833. This Court concluded that "the balance, completeness and structural integrity" was inconsistent with Congressional intent to merely supplement, rather than preempt, other forms of relief. *Brown*, 425 U.S. at 832.

However, even a cursory reading of § 7426 indicates that its structure cannot be favorably compared to the comprehensive structure of the Civil Rights Act. The Civil Rights Act was an all-encompassing piece of legislation that

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was created to afford a new remedy and included a variety of administrative and judicial mechanisms to protect employees who suffered from discriminatory action. On the other hand, prior to the enactment of § 7426, third parties had a remedy but it involved having to sue government officials. Section 7426 simply allowed direct suits against the Government. As for "balance, completeness and structural integrity," § 7426 does not even require a claimant to exhaust administrative remedies before commencing litigation. The Civil Rights Act and § 7426 are not comparable in the sense used in *Brown*. Finally, in *Gordon v. United States*, 649 F.2d 837 (1981), the Court of Claims weighed in on the issue of the exclusivity of § 7426. That Court stated, "While I.R.C. § 7426 does provide a range of remedies, it lacks the "careful blend of administrative and judicial enforcement powers" the Supreme Court underscored in *Brown v. General Services Administration, supra*. . . . Continued jurisdiction in this court does not render I.R.C. §7426 meaningless. Thus, we cannot infer exclusivity." *Gordon*, 649 F.2d at 842.

Further, the legislative history of § 7426 also supports the reasonable inference that it was intended to be supplemental rather than exclusive. First, the 1966 committee reports on § 7426 do not contain any reference to exclusivity. Prior to the enactment of § 7426, persons who suffered from a wrongful levy had a remedy in the form of a suit against the tax collector. § 7426 gave such persons the right to sue the Government directly and prohibited suits against the tax collector.

Section 7426 was enacted to provide a direct source of redress against the Government instead of having to proceed with the fiction of filing suit against an individual government official. To conclude that creating a direct remedy against the Government under § 7426 rendered § 1346 meaningless involves making an inference that is not supported by the known legislative history.

B. Legislative history does not support exclusivity. Further, the inferential argument for exclusivity being made by the Government based on legislative history is not supported by the holding of this Court in *United States v. Williams*, 514 U.S. 527 (1995). The Government argued that the legislative history, at the time § 7426 was enacted, indicated no other remedies were available to non-taxpayers. However, the holding in *Williams* established that § 1346, a statute much older than § 7426, was also available to non-taxpayers.

C. A shorter statute of limitations does not justify an inference of exclusivity. The Government is also arguing for exclusivity by pointing out that the shorter statute of limitations in § 7426 would be rendered meaningless if a third person has the option of utilizing § 1346. This Court was unmoved by that argument. Furthermore, the argument being made by the Government presumes that § 1346 and § 7426 cannot be harmonized and coexist. This is plainly evident by the fact that § 7426 can be used as a pre-deprivation remedy while § 1346 is a post-deprivation remedy. In order for one statute to preempt another, "it is not enough to show that the two statutes produce differing results when applied to the same factual situation." *Radzanower*, 426 U.S. at 155.

D. The holding in *United States v. A.S. Krieder* does not support exclusivity. The Government also relies on *United States v. A.S. Krieder*, 313 U.S. 443 (1941) for the proposition that a shorter statute of limitations tied to a specific remedy will always preempt a longer statute of limitations tied to general relief. *Krieder* was decided on a statute that was phrased as follows: "No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made." *Krieder*, 313 U.S. at 447. The Court held that this language only put an outside limit on the time by which suits must be filed and that, by phrasing it in the negative,

Congress could provide for a shorter statute of limitations for specific types of cases. However § 6511, which provides for the limitations periods in a § 1346 action, is not phrased in the negative. The reasoning in *Krieder* simply does not apply to the issue of whether § 7426 preempts § 1346.

E. The enactment of § 7426(a)(4) as an exclusive remedy supports a reasonable inference that § 7426(a)(1) is not exclusive. In footnote 10 of its Brief, the Government noted that, in the wake of *Williams*, Congress enacted § 7426(a)(4) which gave persons like Williams a remedy apart from a tax refund suit. § 7426(a)(4) provides for exclusivity through the following language: "[no] other action may be brought by such person for such a determination." The footnote goes on to state that "To the extent that this language reflects Congress's intent to make the remedy under § 7426(a)(4) an exclusive one, that does not suggest that the pre-existing wrongful levy remedy in § 7426(a)(1) is not exclusive in situations to which it applies." Notwithstanding the Government's assertion, the most reasonable inference that can be drawn from the enactment of § 7426(a)(4) with its exclusivity provision is that § 7426(a)(1) is not exclusive. As noted earlier in this Reply Brief, Congress knows how to write exclusivity into a statute when that is its intention. Section 7426(a)(4) is a very good example that is relevant to this case.

F. Exclusivity cannot be inferred when two statutes can co-exist. This Court has stated that "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

CONCLUSION

The judgment of the Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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